

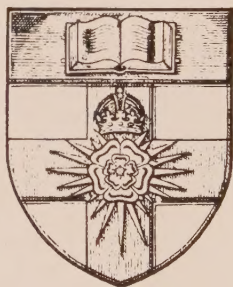
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Finance Act, 1894 (57 & 58 *Vict.* c. 30), ss. 1, 2 (1) (b), 7 (7). *In re BEIT. BEIT v. INLAND REVENUE COMMISSIONERS* **C.A. 53**

— — — ss. 1, 5 (3). *In re LAMBTON'S MARRIAGE SETTLEMENT. MAY v. INLAND REVENUE COMMISSIONERS* **C.A. 752**

— — — s. 2 (1) (c). *In re ROSE. ROSE v. INLAND REVENUE COMMISSIONERS* **C.A. 499**

— — — s. 14 (1). *In re KEELE ESTATES (No. 2). AVELING v. SNEYD* **C.A. 603**

1905

Leeds Corporation (Consolidation) Act, 1905 (5 *Edw.* 7, c. i), s. 24. *ATTORNEY-GENERAL v. LEEDS CORPORATION* **Vaisey J. 172**

1906

Trade Disputes Act, 1906 (6 *Edw.* 7, c. 47), s. 3. *D. C. THOMSON & CO. LD. v. DEAKIN* - **Upjohn J. and C.A. 646**

1914

Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, c. 59), ss. 18, 38 (1). *In re A SOLICITOR*. **Roxburgh J. 328**

— — — ss. 37, 38, 40. *In re LOVE (J. W.). Ex parte THE OFFICIAL RECEIVER v. KINGSTON-ON-THAMES COUNTY COURT REGISTRAR* - - - **C.A. 138**

1918

Income Tax Act, 1918 (8 & 9 *Geo.* 5, c. 40), s. 14 (3), *Sch. D, Case III, r. 1 (a), All Schedules Rules, r. 19. DALE v. INLAND REVENUE COMMISSIONERS*. **C.A. 704**

— — — s. 34. *In re LYONS. BARCLAYS BANK LD. v. LYONS* - - **C.A. 129**

— — — *Sch. D, Case II. HIGGS (INSPECTOR OF TAXES) v. OLIVIER* **C.A. 311**

— — — *Miscellaneous Rules Applicable to Sch. D., r. 2. WILKIE v. INLAND REVENUE COMMISSIONERS* **Donovan J. 153**

1919

Electricity (Supply) Act, 1919 (9 & 10 *Geo.* 5, c. 100), ss. 21, 22. *NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY v. MIDLANDS ELECTRICITY BOARD* - - **Vaisey J. 380**

1920

Finance Act, 1920 (10 & 11 *Geo.* 5, c. 18), s. 33. *DALE v. INLAND REVENUE COMMISSIONERS* - - - **C.A. 704**

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, c. 17), s. 17 (2). *TIDEWAY INVESTMENT AND PROPERTY HOLDINGS LD. v. WELLWOOD* - - - **C.A. 791**

1923 & 1925

Mines (Working Facilities and Support) Acts, 1923 & 1925 (13 & 14 *Geo.* 5, c. 20; 15 & 16 *Geo.* 5, c. 91), s. 3 (1) (2) (4) (6); s. 6 (1) (3) (4) (5). *In re WOLSTANTON LD.'S APPLICATION*. **Danckwerts J. 519**

1925

Administration of Estates Act, 1925 (15 *Geo.* 5, c. 23), s. 34 (3); *Sch. 1, Pt. II, paras. 2, 4, 8 (a). In re MELDRUM, DECD.; SWINSON v. MELDRUM*. **Upjohn J. 208**

— — — s. 42. *In re KEHR, DECD. MARTIN v. FOGES* - - **Danckwerts J. 26**

Land Registration Act, 1925 (15 *Geo.* 5, c. 21), ss. 3, 70 (1). *CITY PERMANENT BUILDING SOCIETY v. MILLER* - **C.A. 840**

— — — s. 70 (1). *WOOLWICH EQUITABLE BUILDING SOCIETY v. MARSHALL* **Danckwerts J. 1**

Law of Property Act, 1925 (15 Geo. 5, c. 20),
s. 56 (1). *STROMDALE & BALL LD. v.*
BURDEN - - - **Danckwerts J. 223**

— — — s. 164, Sch. 7. *In re BRADWELL.*
GOODE v. BOARD OF TRUSTEES FOR
METHODIST CHURCH PURPOSES.
Roxburgh J. 575

Settled Land Act, 1925 (15 Geo. 5, c. 18),
s. 81. *In re POMFRET'S SETTLEMENT.*
GUEST v. POMFRET **Roxburgh J. 48**

Trustee Act, 1925 (15 Geo. 5, c. 19), ss. 31,
32. *In re KEHR, DECD. MARTIN v.*
FOGES - - - **Danckwerts J. 26**

— — — s. 32 (3). *In re BATTY, DECD.*
PUBLIC TRUSTEE v. BELL
Vaisey J. 280

— — — s. 41 (1). *In re A SOLICITOR*
Roxburgh J. 323

1926

Legitimacy Act, 1926 (16 & 17 Geo. 5, c. 60),
s. 8. *In re HURLL DECD. ANGELINI*
v. DICK - - - **Harman J. 722**

Mining Industry Act, 1926 (16 & 17 Geo. 5,
c. 28), s. 13. *In re WOLSTANTON*
LD.'S APPLICATION.
Danckwerts J. 519

1929

Companies Act, 1929 (19 & 20 Geo. 5, c. 23),
Sch. 1, Table A, art. 68. *READ v.*
ASTORIA GABAGE (STREATHAM) LD.
C.A. 637

1932

Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37),
s. 69. *WIMBOURNE v. FINE.*
Harman J. 869

Town and Country Planning Act, 1932 (22 &
23 Geo. 5, c. 48), s. 10 (3) (5).
MARKS & SPENCER LD. v. LONDON
COUNTY COUNCIL - - - **C.A. 549**

1933

Solicitors Act, 1933 (23 & 24 Geo. 5, c. 24),
ss. 1, 8 (1). *In re A SOLICITOR.*
Roxburgh J. 323

1938

Finance Act, 1938 (1 & 2 Geo. 6, c. 46), s. 48.
In re LAMBTON'S MARRIAGE SETTLE-
MENT. MAY v. INLAND REVENUE COM-
MISSIONERS - - - **C.A. 752**

1939

Compensation (Defence) Act, 1939 (2 & 3 Geo.
6, c. 75), s. 2 (1) (b). *In re*
POMFRET'S SETTLEMENT. GUEST v.
POMFRET - - - **Roxburgh J. 48**

Trading with the Enemy Act, 1939 (2 & 3
Geo. 6, c. 89), s. 7. *In re POZOT'S*
SETTLEMENT TRUSTS. WESTMINSTER
BANK LD. v. GUERBOIS - **C.A. 427**

1940

Finance Act, 1940 (3 & 4 Geo. 6, c. 29), s. 43.
In re BEIT. BEIT v. INLAND REVENUE
COMMISSIONERS - - - **C.A. 53**

1941

Solicitors Act, 1941 (4 & 5 Geo. 6, c. 46),
Sch. 1, para. 5. *In re A SOLICITOR.*
Roxburgh J. 323

1946

National Health Service Act, 1946 (9 & 10
Geo. 6, c. 81), s. 6 (1). *In re MAR-*
JORIBANKS TRUST DEED; FRANKLAND
v. MINISTRY OF HEALTH - **C.A. 181**

— — — s. 6 (2). *MINISTER OF HEALTH v.*
STAFFORD CORPORATION - **C.A. 730**

— — — s. 79. *In re COUCHMAN. COUCH-*
MAN v. ECCLES - **Danckwerts J. 391**

1947

Town and Country Planning Act, 1947 (10
& 11 Geo. 6, c. 51), s. 19. *EALING*
BOROUGH COUNCIL v. MINISTER OF
HOUSING AND LOCAL GOVERNMENT.
Upjohn J. 856

— — — s. 78 (1). *MARKS & SPENCER LD.*
v. LONDON COUNTY COUNCIL
C.A. 549

1948

Companies Act, 1948 (11 & 12 Geo. 6, c. 38),
s. 56. *HEAD (HENRY) & CO. LD. v.*
ROPNER HOLDINGS LD.
Harman J. 124

— — — ss. 257 (1), 302, 316, 317. *In re*
ART REPRODUCTION CO. LD.
Wynn-Parry J. 89

— — — ss. 352 (1), 353 (6). *In re BELMONT*
CO. LD. - - - **Wynn-Parry J. 10**

Finance Act, 1948 (11 & 12 Geo. 6, c. 49),
ss. 47, 49, 68 (2). *DALE v. INLAND*
REVENUE COMMISSIONERS - **C.A. 704**

1949

National Health Service (Amendment) Act,
1949 (12, 13 & 14 Geo. 6, c. 93), s. 1.
WHITEHILL v. BRADFORD.

C.A. 236

Registered Designs Act, 1949 (12, 13 & 14
Geo. 6, c. 88), s. 1 (4). USHER v.
BARLOW - - - C.A. 255

1950

Adoption Act, 1950 (14 Geo. 6, c. 26), s. 2 (5).
In re ADOPTION APPLICATION 52/1951
Harman J. 16

Matrimonial Causes Act, 1950 (14 Geo. 6,
c. 25), s. 32 (1) and (2). *In re*
JENION. JENION v. WYNNE - C.A. 454

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Companies (Winding-up) Rules, 1949 (S.I.
1949, No. 330), r. 163. *In re* F. T.
HAWKINS & Co. LD.

Wynn-Parry J. 881

*Conditions of Employment and National
Arbitration Order*, 1940 (S.R. & O.
1940, No. 1305), cl. 7. *In re* BIRKEN-
HEAD CORPORATION. QUIGLEY v. BIR-
KENHEAD CORPORATION.

Romer L.J. 359

Designs Rules, 1949 (S.I. 1949, No. 2368),
r. 26. USHER v. BARLOW C.A. 255

R.S.C. Ord. 55, r. 5a. ALLIANCE BUILDING
SOCIETY v. SHAVE.

Wynn-Parry J. 581

— *Ord. 65*, r. 27 (29). REED v. GRAY
Roxburgh J. 337

Solicitors' Accounts Rules, 1945 (S.R. & O.
1944, 781.L.34), rr. 2 (1), 3, 4. *In*
re A SOLICITOR - Roxburgh J. 328

Trading with the Enemy (Custodian) Order.
1939 (S.R. & O. 1939, No. 1198),
paras. 1 and 2. *In re* POZOT'S
SETTLEMENT TRUSTS. WESTMINSTER
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*Trading with the Enemy (Specified Areas)
Order*, 1940 (S.R. & O. 1940, No.
1219). *In re* POZOT'S SETTLEMENT
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ERRATA

P. 99, note 5. The reference should read [1902] 1 Ch. 428.

P. 157. Penultimate sentence of first new paragraph should read: "Therefore
"starting with the proposition that before 1850 month meant lunar
"month. . . ."

CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL

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[1950 W. 4118.]

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Oct. 5.

Landlord and Tenant—Letting by purchaser in possession—Subsequent completion of purchase and mortgage—Registered land—Tenancy ranking in priority to mortgage—Land Registration Act, 1925 (15 Geo. 5, c. 21), s. 70 (1).

On September 13, 1948, certain freehold premises at Acton, Middlesex, were conveyed to a purchaser for £1,450, and, on the same date, he executed a legal charge on the premises to secure an advance of £1,300 from a building society. The transfer and charge were, on September 28, 1948, duly registered under the Land Registration Act, 1925. The charge recited that the purchaser was "the estate owner in respect of the property", and it contained a clause providing that leases should not be made of the property without the authority of the society.

On September 7, 1948, it was orally agreed between the purchaser and a tenant of the basement flat on the premises, to whom the purchaser had, in August, 1948, been introduced by one of the vendors as the tenant's future landlord, that the tenant should receive, instead of his present flat, a tenancy of the top-floor flat, beginning on September 13, 1948; and on September 11, 1948, he went into occupation of that flat.

A summons was taken out by the society to enforce its legal charge:—

Held, that the tenant was, by virtue of his occupancy, the owner of an "overriding interest," under section 70 of the Land Registration Act, 1925, and that the society's interest was therefore subject to his interest.

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Held, also, that the purchaser had become the estate owner, i.e., the legal owner of the fee simple of the property subsequently charged by him; that, consequently, the tenancy, which he had previously attempted to create, while equitable owner, in favour of the tenant, was confirmed by the subsequent accrual of his interest; and that, at the moment when the charge was executed, the tenant had a legal tenancy which ranked in priority to the charge and which did not fall within the stipulation contained in the charge that leases should not be made of the property subject to the charge without the authority of the society.

Coventry Permanent Economic Building Society v. Jones [1951] W.N. 218; [1951] 1 All E.R. 901 considered and distinguished.

ADJOURNED SUMMONS.

On September 13, 1948, a conveyance was made to Kenneth William Marshall of certain freehold premises at Acton, Middlesex, for £1,450. The title to the land was, on September 28, 1948, registered under the Land Registration Act, 1925.

On the same date as that of the conveyance a legal charge of the property to the Woolwich Equitable Building Society was executed by the purchaser and duly registered on September 28, 1948. The charge recited that the mortgagor "being the estate owner in respect of the property described in the schedule hereto and a member of the society, has requested the society to advance to him the sum of £1,300"; and it contained a clause providing that: "The mortgagor shall not exercise the powers of leasing and of accepting surrenders of leases vested in him by virtue of this deed or any statute in that behalf without the consent in writing of the society given under the hand of the secretary for the time being of the society."

The instalments due under the charge being in arrear, there would have been no doubt as to the rights of the society to enforce their charge and recover the property from the mortgagor, but for the fact that a tenant, Leslie Edward Long, was in occupation of the top-floor flat under the following circumstances. He became tenant of the basement flat in 1946 under a tenancy from the vendors, and in August, 1948, he was introduced by one of the vendors to the purchaser as his future landlord. On September 7, 1948, it was orally agreed between him and the purchaser that he should give up the tenancy of the basement flat and receive instead a tenancy of the top-floor flat, which was to begin on September 13, 1948. Immediately after the interview he began to move his furniture into the top-floor flat, went into occupation on September 11, 1948, and had remained there since that date.

An originating summons was taken out by the society for an order that the mortgagor and the tenant should deliver possession of the premises to the society. It was claimed on behalf of the tenant that he became tenant of the top-floor flat as from September 7, 1948, or, alternatively, as from September 13, 1948, and that he was entitled to retain possession of the flat as a weekly tenant by virtue of the Rent Restriction Acts.

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E. D. Sutcliffe for the plaintiff society. No consent to this tenancy was ever given by the society. This is a case of registered land. The society is entitled to an order for possession against the mortgagor. The question as to the rights of the tenant depends on his legal position at the time of the mortgage.

*Coventry Permanent Economic Building Society v. Jones*¹ was a case of unregistered land and, apart from that fact, would not be distinguishable from the present case. In the present case there was a provision in the mortgage prohibiting the granting of leases: see *Dudley and District Benefit Building Society v. Emerson*.² Therefore, when the purchaser was in possession, he was not in a position to grant a lease to the tenant; and, if the charge and conveyance were simultaneous, the purchaser had no title enabling him to grant the tenancy. Accordingly, the tenant could not have any greater right in the property than the right to have a tenancy granted to him if consent had been given; and no consent had ever been given.

Lightman for the defendant tenant. On the facts the plaintiff society is not entitled to succeed. The facts are different from those in *Coventry Permanent Economic Building Society v. Jones*.³ The society must rely on the legal charge. This is a case where the tenant occupied part of the property two years before the society came on to the scene. Some time before August 13, 1948, one of the vendors came to the tenant and said that the purchaser was going to be his landlord. Then came the tenancy. If the purchaser was the legal owner of the premises on September 13, 1948, he was in a position to grant a legal tenancy. The tenancy of the top-floor flat began on September 7, 1948, or, alternatively, on September 11, 1948, when the tenant moved out of the basement flat into the top-floor flat.

The society cannot claim possession, as it should have made inquiries about the position of the purchaser with regard to the

¹ [1951] W.N. 218; [1951] 1 All E.R. 901.

² [1949] Ch. 707, 714.

³ [1951] W.N. 218; [1951] 1 All E.R. 901.

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lease. This is a clear case of estoppel. The tenant became a tenant by estoppel against the vendors. As to the general nature of estoppel, see Spencer Bower on Estoppel by Representation, pp. 152, 253. The society must take the title of the vendors as it is, and cannot be in a better position than the position in which the vendors were. The society accepted the mortgage with notice of the occupation of the tenant and made no inquiries before the completion of the transfer by registration. The legal date of the completion of the purchase was the date of the registration of the transfer, namely, September 28, 1948: see Land Registration Act, 1925, s. 19.⁴

The tenancy is an "overriding interest" within the provisions of section 70 of the Land Registration Act, 1925,⁴ which are binding on the society. The society's interest is, therefore, subject to the tenant's overriding interest and he is entitled to retain possession of the top-floor flat.

The purchaser did not appear.

DANCKWERTS J. stated the question raised by the summons and continued:—There would be no doubt as to the society's rights to enforce their legal charge, but for difficulties arising out of the claim made by the defendant Long. He is in possession under a tenancy, under which he claims to be protected by the Rent Restriction Acts. [His Lordship then stated the facts on which Long based his claim and continued:] The date on which the conveyance was made by the vendors to the defendant Marshall has not been properly proved. It is alleged that it was on September 13, 1948, the same day as the date of the legal charge to the society. All the probabilities are in favour of that statement being correct. My judgment will, therefore, proceed on the footing that it can be proved, as it could be no doubt quite easily, that his title depended on a conveyance of September 13, 1948.

⁴ Land Registration Act, 1925, s. 19 (1): "The transfer of the "registered estate in the land or part "thereof shall be completed by the "registrar entering on the register "the transferee as the proprietor of "the estate transferred, but until such "entry is made the transferor shall be "deemed to remain proprietor of the "registered estate. . . ."

Section 70 (1): "All registered "land shall, unless under the pro- "visions of this Act the contrary is

"expressed on the register, be deemed "to be subject to such of the following "overriding interests as may be for "the time being subsisting in refer- "ence thereto, and such interests "shall not be treated as incumbrances "within the meaning of this Act, " (that is to say) . . . (g) The rights "of every person in actual occupation "of the land or in receipt of the "rents and profits thereof, save where "inquiry is made of such person and "the rights are not disclosed. . . ."

A further fact is that the title to the land was registered under the Land Registration Act, 1925, and it appears from an inspection of the charge certificate that the registered transfer and the legal charge in favour of the society were not in fact completed by registration under that statute until September 28, 1948. It is claimed on the evidence that on September 13 and on September 28, 1948, the defendant Long was in possession of the top-floor flat. He was undoubtedly on those dates in possession under an oral agreement for a tenancy, made with Marshall, which was to begin on September 13. If he was in possession at a previous date it is not at all clear, at any rate, that his right to possession was due to his tenancy or due to any tenancy; it may have been merely by leave and licence of the landlord preparatory to a tenancy to begin on September 13. It is also plain that, until the end of the week preceding September 13, he was still tenant of the basement flat, because he had paid his rent of ten shillings in advance at the beginning of that week.

It is argued on behalf of the defendant Long that his right to his tenancy does not depend solely on the legal title of the defendant Marshall, which it appears by reason of the provisions of section 19 of the Land Registration Act, 1925, did not become effective in law until September 28, 1948, but depends on, and is supported by, the legal ownership of the vendors, which existed, of course, as long ago as 1946, and which, it is contended, supported the agreement by the defendant Marshall to create a new tenancy in respect of the top-floor flat as early as September 7, 1948, or earlier.

It is said that the defendant Marshall was an agent of the vendors to manage the property at the material dates on their behalf, and also that, by representing to the defendant Long that, at any rate from the end of August, 1948, Marshall was the landlord, they would be estopped from denying that he was the legal owner of the property from that date. Therefore, by estoppel, any tenancy granted by Marshall would be effective against the vendors and would, consequently, also be effective against the society, as its title is derived from and based on the title of the vendors.

It seems to me that both branches of that argument fail. I see no reason to suppose that Marshall was in any way made the agent of the vendors, nor do I think any estoppel was created against them. There was a representation, according to Long's evidence, that Marshall was to become the landlord; but that statement seems to be an ambiguous statement, which is perfectly

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consistent with the true facts, and the true facts are that, at that date, Marshall had agreed to purchase the property and was therefore in equity the owner of it by virtue of his contract.

Either coincidentally with or immediately before the creation of the charge, however, Marshall had become the legal owner of the freehold in the property and, therefore, when he became the legal owner of the freehold, was in a position to implement the oral contract for a tenancy which he had made with Long, even though, owing to the provisions of the Land Registration Act, 1925, neither the conveyance to Marshall nor the charge passed a legal estate till these transactions were registered on September 28, 1948. It is true that it appears that to create any such tenancy was a breach of faith, to say the least of it, as regards the society, because, in the application for an advance and in his acceptance of the advance, he had stated that he would be in possession of the top-floor flat. Further, it is equally clear that, as soon as he had executed the charge, it was a breach of his contract contained in the charge to create any tenancy without the consent of the society, and, as from that date, any tenancy, which he created would be void as against the society, as mortgagees.

I am bound, it is said, by a decision of Harman J. to hold that these transactions for the acquisition of the property and the mortgaging of it to the society represent, and are to be regarded as, one transaction, so that there was no scintilla of time by virtue of which Marshall, as the legal owner of the property, was free to deal with it as he chose and not be subject to the legal charge to the society.

That case is *Coventry Permanent Economic Building Society v. Jones*,⁵ and the facts, so far as one can ascertain them, are stated in the judgment of Harman J. It appears that the mortgagor had agreed to buy the property for £1,800 on February 15, 1949. On February 16, Mrs. Jones, the purchaser, who was the mortgagor also, entered into an agreement with her tenants for a tenancy at the rate of 25s. a week, which was to commence on the day on which the tenants took possession of the flat as provided in cl. 2 of the agreement. That clause provided that the tenants would, within fourteen days after the landlord should have repaired and redecorated the flat, surrender to the landlord the tenancy of the dwelling-house and yield it up to her. It appeared that the society agreed to make an advance of £1,440 to the mortgagor to enable her to complete her purchase; that

⁵ [1951] W.N. 218; [1951] 1 All E.R. 901.

means, of course, that they were prepared to make the advance and not that they bound themselves legally so that they could be compelled to make any such advance.

On March 16, 1949, the mortgagor let the tenants into possession and gave them a rent book. On March 18, the property was conveyed to the landlords by the vendor in consideration of the sum of £1,800 expressed to be paid by her. At the same time she mortgaged the property by demise to the society for the usual term of 3,000 years, subject to redemption, to secure the £1,440, the obligation being to pay it back by instalments in the usual way. The statutory power of the mortgagor to create leases was excluded by that document.

Then Harman J. goes on to say this: "After that, therefore, she could create no lease without the leave of the mortgagees which would be binding against them. That is shown, if authority for it be needed, by *Dudley and District Benefit Building Society v. Emerson*.⁶ It is said, however, that the tenancy of the Misses Mason preceded the rights of the mortgagees in this way. There is an old doctrine (none the worse for being old) that if A purports to create a lease in B's favour, A having no estate sufficient to support the lease, then, if A afterwards acquires a sufficient estate, he will be bound not to deny that he always had a good right to create the tenancy and the lease is said to take effect by estoppel. That doctrine, it is argued, applies here. The giving of a rent book to the tenants on March 16, 1949, created, it is said, a tenancy by estoppel which was immediately effective when the grantor acquired the legal estate in fee simple, which she did by the conveyance to her on March 18, 1949, and there must be predicated, a scintilla temporis between the conveyance to her and the mortgage by her into which the tenancy by estoppel can be inserted so as to get precedence to the mortgage of the building society.

"The question is whether I must assume the scintilla temporis and assume that because of the obligations of the landlord she must be held to have defrauded her mortgagee by creating a tenancy which is good against the society although it was not willing to lend the money except on the footing that she had no such right. I do not see why I need postulate this. The whole transaction was one transaction. The vendor would not sell without receiving his purchase money, and the mortgagee would not provide the purchase money without receiving the

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⁶ [1949] Ch. 707.

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" term of years. The money, in fact, went straight—as is the
" usual practice—from the mortgagee to the vendor, and not until
" it was in the vendor's hands would a legal state be created
" either in favour of the landlord or of the mortgagee. It seems
" to me that the whole thing is one transaction in substance, and
" I am not constrained to introduce an artificiality so as to affect
" the rights of the building society. Consequently, I reject the
" argument that the doctrine of estoppel must have created in
" the tenants an estate in priority to that of the building society.
" The grantor of the so-called tenancy would never have acquired
" the estate which she did acquire but for that mortgage money,
" and it would not be right, therefore, to introduce a fiction in
" the manner suggested."

I will pause there to observe that, so far as morality is concerned, there is in the present case not a great deal between the position of the society and the tenant Long. Each has no doubt been deceived by Marshall. Marshall deceived the society, because he had obtained the advance on the footing that he would be the occupier of the top flat, and he deceived the defendant Long, because he never intimated to Long the existence of the proposed borrowing from the society and led him to suppose that he was perfectly free to create a tenancy in his favour. There is not much reason for favouring one party more than the other or for sympathizing with the society rather than the tenant, who finds his tenancy threatened.

The second point dealt with by Harman J. was the question whether the society had notice of the tenant's rights. As regards that point he decided against the tenant because he held that the agreement for a tenancy, which the tenant had, required registration under the Land Charges Act, 1925, as an estate contract and therefore, by virtue of section 19 of the Law of Property Act, 1925, owing to failure to register the land charge, the agreement was not effective against the society, as a purchaser for value.

In the present case, so far as that point is concerned, the matter depends on the provisions of section 70 of the Land Registration Act, 1925. [His Lordship read the section and continued:] Therefore it would appear that, so far as the tenancy of the defendant Long is concerned, if there is no other reason under which it is to be dismissed as not effective against the society, it is binding on the society as an overriding interest under section 70 of the Land Registration Act, 1925, because it is plain that at the very moment from the beginning of the day, September 13, and, a fortiori, on September 28, 1948, the defendant Long was

in possession of the upper flat of the property. Therefore, by virtue of his occupancy, he was an owner of an overriding interest under the old rule about the rights of persons in possession putting the purchaser on inquiry, and the society is subject to his overriding interest and to his rights, whatever they may be.

That factor, at any rate, distinguishes this case from the case before Harman J. in respect of his second point. But there remains the first point; that is to say, ought I to hold, following the decision of Harman J. that the transaction is so entirely one transaction, that there was no moment of time, between the acquisition by Marshall of his estate and the mortgage to the society, in which the defendant Long's estate by estoppel could become a legal estate in interest.

I think it clear from the judgment of Harman J. that, if there had been any appreciable interval, he would have held that such an estate in interest was created under the old rule,

In the report of the case before Harman J.⁷ the terms of the mortgage and the arguments of counsel are not set out. I am, therefore, unable to ascertain whether there was in the mortgage by demise in that case anything in the terms of the recital, which I find in the present charge. I do not know whether it was there or not and, in the absence of my ability to ascertain that fact, I do not feel that I ought to follow that decision and apply it in the present case in a matter which seems to me to be of considerable doubt and which, unless the former case is exactly similar to the present case, I do not feel is necessarily concluded beyond argument.

It seems to me that a mortgagee, who has inserted in the deed under which he acquires title a statement that the mortgagor is "the estate owner in respect of the property" which is being mortgaged or charged to the mortgagee, cannot object if that statement is taken to be true. Therefore, it seems to me that the irresistible inference is that I must assume that to be the position, even if the transfer by the vendors to the purchaser bore the same date as the charge. In fact, the transfer must have been executed at a time earlier than that at which the charge to the society was executed; so that there was a time in which it would be correct to say that the mortgagor had become the estate owner, i.e., the legal owner of the fee simple of the property subsequently charged by him to the society to secure the amount of his loan.

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⁷ [1951] 1 All E.R. 901.

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If I reach that conclusion, it seems to me that it follows that the tenancy, which the defendant Marshall had attempted to create, while equitable owner, in favour of the defendant Long, was confirmed by the accrual of Marshall's interest; and the defendant Long therefore had, in fact, at the moment when the charge was executed, a legal tenancy of the portion of land in respect of which he was in possession; and that that tenancy must rank in priority to the charge and does not fall within the stipulation, contained in the charge, that leases should not be made of the property subject to the charge without the authority of the society.

I, therefore, come to the conclusion that the defendant Long has an effective weekly tenancy at the standard rent of 13s. 9d. a week, payable in advance, and is, to that extent, entitled to retain possession against the society.

Declaration accordingly.

Solicitors: *A. E. Shrimpton; W. A. G. Davidson & Co.*

J. L. D.

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PARRY J.

In re BELMONT & CO. LD.

1951
Oct. 15.

Company—Company struck off Companies Register—Consequent dissolution of company—Application to declare dissolution void—Jurisdiction—Representation of Attorney-General—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), ss. 352 (1), 353 (6).

The jurisdiction of the court under section 352 (1) of the Companies Act, 1948, to declare the dissolution of a company void is not affected by the power of the court under section 353 (6) to restore to the Companies Register the name of a company which has been struck off under section 353. Where, therefore, the dissolution of a company was effected by striking the company's name off the register under section 353, the court has jurisdiction under section 352 (1) to declare the dissolution void, and under its inherent power to order the restoration of the company's name to the register.

On an application under section 352 (1), the presence of the Attorney-General by counsel at the hearing is not necessary in a simple case not requiring any argument by him, and his consent may be shown by a letter exhibited to the applicant's evidence.

MOTION.

A company registered on December 10, 1932, had carried on business since its formation until July, 1948, as furriers and makers up and manufacturers of ladies' outerwear. About July, 1948, the company sold its businesses and assets to two companies, one company taking over the business of furriers, and another company taking over the remainder of the business.

Some time before August 19, 1949, the Registrar of Companies, acting under section 353 of the Companies Act, 1948,¹ struck the name of the company off the Register of Companies, and in the same day published a notice of the fact in the Register, the result being that the company was dissolved. Notice of the dissolution was published in the London Gazette on August 19, 1949.

At the date of the dissolution the Commissioners of Inland Revenue had made various assessments to tax on the company, including excess profits tax, income tax and profits tax. These assessments were all under appeal, but in consequence of the dissolution of the company the Commissioners were unable to proceed with the appeals unless the dissolution of the company were declared void. They therefore brought this motion under subsection (1) of section 352 of the Companies Act, asking that the dissolution be declared void.

M. Berkeley for the Commissioners of Inland Revenue. The taxes owing to the Inland Revenue are under appeal and, therefore, they may not be creditors so as to be entitled to proceed under section 353. They are, however, persons interested within the meaning of section 352. The opening words of that section

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¹ Companies Act, 1948, s. 352 (1):
"Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order . . . declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

Section 353: The registrar has power to strike off the register the name of

a company in default or which has ceased to carry on business.

Subs. (6): "If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of twenty years from the publication in the *Gazette* of the notice aforesaid may, if satisfied that . . . it is just that the company be restored to the register, order the name of the company to be restored to the register, and . . . the company shall be deemed to have continued in existence as if its name had not been struck off. . . ."

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are quite unqualified, and the section applies wherever a company has been dissolved. [Counsel referred to section 208 (1) (d); section 274 (1); section 290 (4); and section 300 (4) of the Companies Act, 1948.]

Section 352 would apply to all the cases under those sections. Where application is made under subsection (6) of section 353, it may be made within twenty years, but the class of persons who may apply is limited to the company or a member or creditor of the company. Under section 352 the period within which the application has to be made is two years, but the class of applicants is wider: "any . . . person who appears to the court to be "interested" may apply. Subsection (6) of section 353 does not by implication exclude section 352. If that had been intended the Act would have said so.

It is submitted that wherever a company has been dissolved the court has power to proceed under section 352 to declare the dissolution void.

There is no provision in section 352 to restore the company's name to the register, but where a dissolution is declared void, it must automatically follow that the name of the company is restored to the register.

Denys Buckley for the Attorney-General. On applications under section 352 the Attorney-General is normally represented by counsel at the hearing, but there is no reason why in a simple straightforward case requiring no argument by him, that his consent should not be shown by a letter exhibited to the applicant's evidence in which it is stated that he has no objection to the application.

WYNN-PARRY J. This motion raises a short but not uninteresting question of jurisdiction. The necessity for the applicants to proceed under section 352 is that at the date of the dissolution of the company (which was effected under section 353 by the Registrar of Companies striking the name of the company off the register with effect from August 19, 1949) the Commissioners of Inland Revenue had assessed the company for various taxes, excess profits tax, income tax and profits tax; but in each case the assessments were under appeal, so that it is at least doubtful whether it could be said that the Commissioners of Inland Revenue were creditors of the company so as to entitle them to proceed by petition under section 353 for an order restoring the name of the company to the register.

[His Lordship read section 352 (1) of the Companies Act, 1948, and continued:] It is to be observed that the conditions which must exist before the court has any jurisdiction to make an order under that section are, first, that the company has been dissolved; secondly, that the application should be made within two years of the date of the dissolution; and thirdly, that it shall be made by the liquidator or any other person who appears to the court to be interested. A comparatively short time is provided under that subsection within which the application can be made; but, on the other hand, the application can be made by any member of what may well be a very wide class.

In contra-distinction there are to be observed the relevant provisions of section 353. That is a section which provides the machinery by which if a company is in default in filing proper returns with the Registrar of Companies, the registrar may strike the name of that company off the register and shall publish notice thereof in the Gazette, with the consequence that on the publication of that notice in the Gazette the company becomes dissolved. It is to be observed that to subsection (5) there is a proviso (b): "nothing in this subsection shall affect the power of the court "to wind up a company the name of which has been struck off "the register." Then follows subsection (6), which gives a right in certain circumstances to make application for the restoration of the company's name to the register. [His Lordship, having read the relevant part of subsection (6) of section 353, continued:] The conditions of an application under section 353 are first of all that the company should have been dissolved under subsection (3) or subsection (5); secondly, that the application, which is made by petition instead of by motion as under section 352, must be made by a company or by a member or creditor of the company; and thirdly, that it must be made before the expiration of twenty years from the publication of a notice in the Gazette. It thus becomes clear upon an examination of sections 352 and 353 why the applicants in this case are constrained to proceed under section 352 by way of motion for a declaration that the dissolution of the company is void, instead of proceeding by way of petition under section 353 for the restoration of the name of the company to the register.

The language of section 352 taken by itself is clearly wide enough to confer on the court jurisdiction to make the order for which the applicants ask. It is a section which *prima facie* refers to, and is intended to cover all the cases under the Act where a company has been dissolved. Reference was made in argument

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to those various cases. Under section 208 (1) (d) the court has jurisdiction as part of the machinery for facilitating a reconstruction or amalgamation to provide, inter alia, for the dissolution of a company without winding up. Section 274 (1) of the Act, which relates to the dissolution of a company, provides: "When the affairs of a company have been completely wound up, the court, if the liquidator makes an application in that behalf, shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly." It is true, as was pointed out by Mr. Berkeley on behalf of the applicants, that the practice since 1890, notwithstanding the various Companies Acts which have been in force between that date and the present time, has been not to make any such application, but for the Registrar of companies two years after the liquidator's release to make inquiry of the official receiver whether there is any reason why the company should continue to be regarded as being alive and, if no reason is shown, then to take the necessary steps. But, whatever the practice may be, section 274 provides a case to which section 352 (1) would apply. Section 290 relates to the final dissolution in a members' winding up, and section 300, in a corresponding manner, to a creditors' winding up. By subsection (4) of those two sections it is in effect provided that the registrar on receiving the account and either of the returns mentioned in the respective sections shall forthwith register them, and on the expiration of three months from the registration of the return, the company shall be deemed to be dissolved. Those are clearly cases to which section 352 (1) would apply.

There being clear provision in the language of section 352 which would entitle the court to accede to this application, is there anything in section 353 (which is the only other section to be considered) which would operate to limit in any way the wide jurisdiction of the court under section 352? Section 353 is concerned, of course, with an entirely different procedure; it postulates, as I have already pointed out, a company in default and, after the registrar has invoked the machinery there provided by striking the company's name off the register and brought about the dissolution of the company, it further provides that the dissolution shall in circumstances there set out in effect be set aside by the restoration of the company's name to the register. It is true that in this case the dissolution was in fact brought about by putting into operation the machinery provided by section 353.

There is no authority on the matter one way or the other. The question appears to me to depend solely upon a consideration of the language of the two sections read in the light of the other sections to which I have referred. In my judgment there is not to be found in section 353 any sufficient ground for saying by the force of the language of that section that the jurisdiction of the court under section 352 is circumscribed: indeed, there is if anything a pointer the other way to be found in the proviso to subsection (5) of section 353, to which I have already referred. That postulates that the court can bring the company sufficiently to life in order to wind it up, and that can be done without any reference to subsection (6). In my view section 352 is unaffected by section 353, and the effect of declaring a dissolution void under that section where a company has been struck off the register under section 353 is to bring about the same position as obtained before the dissolution took place, and that therefore under section 352 there is inherent in the court jurisdiction to order restoration to the register of the name of a company struck off under section 353.

It only remains to consider one short point which was raised by Mr. Buckley. In cases under section 353 it is plainly necessary that the Registrar of Companies should be represented in order that he may make clear to the court what is the default for which the company is struck off, and what are the undertakings which should be required by the court as to filing returns as a condition of making an order under subsection (6) of that section. Under section 352 it has been the practice for the Attorney-General to be represented if only to consent to the order being made. Mr. Buckley has submitted that in any case where the Attorney-General is satisfied after investigation that the case is a simple and straightforward one, and not requiring any argument on his behalf, it would be desirable in the interests of economy that the fact of his consent should be demonstrated by exhibiting to the applicant's evidence a letter stating that the Attorney-General offers no opposition to the motion. In my view, particularly under present-day conditions, there is everything to recommend that course.

For the reasons which I have already given, therefore, I propose to accede to the motion and to declare the dissolution of the company void.

Order accordingly.

Solicitors: *Solicitor of Inland Revenue; Treasury Solicitor.*

I. G. R. M.

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In re ADOPTION APPLICATION 52/1951.1951
Oct. 16, 17.

[1951: M. 2738.]

Infant—Adoption application by husband and wife—Applicants living in Nigeria except when on leave—Residence qualification—Adoption Act, 1950 (14 Geo. 6, c. 26), s. 2 (5).

By the Adoption Act, 1950, s. 2: "An adoption order shall not "be made in England unless the applicant and the infant reside in England." A husband and wife who lived in Nigeria, habitually returned to England during the husband's periods of leave. They decided to adopt a child, and, at the beginning of a period of leave, the child they wished to adopt was put into their charge by an adoption society. During the same leave period they also purchased a house in this country. At the end of the three-months' period required by section 2 (6) of the Act of 1950, they applied to the High Court for an order to adopt the child. Before the matter came on, the husband returned to Africa, but his wife remained in this country, intending to join him with the child as soon as possible after the order was made:—

Held, that the court had no jurisdiction to make an order for, at the time when the matter came before it, neither of the applicants was residing in the United Kingdom for the purpose of section 2 (5) of the Act of 1950, but they were merely staying here during a period of leave.

It was a question of fact in every case whether an applicant was resident for the purpose of that subsection and it was inadvisable to define what was meant by "reside in England." There must, however, be some degree of permanence; it was not necessary for the applicant to show that he had a home of his own in this country, but he must have a settled headquarters here.

In re W. (1946) (not reported) considered.

ADJOURNED SUMMONS.

An application to adopt a child was made by a husband and wife. The husband was a district officer in the Nigerian Colonial Service, and his duties required him to live in Nigeria throughout his service. His wife lived in Nigeria with him. Every fifteen months he had a period of leave of about three months, and he and his wife habitually returned to this country and lived with his or her parents for the leave periods. While on leave in 1951, they bought a house in England with the intention of setting up a home in this country, apparently intending to return to reside there permanently after about seven years, when the husband's term of service would have ended. For the time

[Reported by MISS E. DANGERFIELD, Barrister-at-Law.]

being they did not take possession of the house, though they bought furniture for it. They had no children, and decided that they would like to adopt a child. They found one which was suitable, and it was put into their care by an adoption society at the beginning of the leave period referred to above.

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When the three months' period required by section 2 (6) of the Adoption Act, 1950,¹ had elapsed, they, having complied with all other statutory requirements, applied to the High Court for leave to make the adoption. Before the matter came on, however, the husband's leave came to an end and he returned to Nigeria and did not persist in his application, the Official Solicitor having expressed the view, as guardian ad litem of the child, that an order could not, in the circumstances, be made in his favour. His wife stayed behind, intending to follow him with the child as soon as the order for adoption was made.

Denys Buckley for the applicants. The wife, it is submitted, has satisfied the requirement of section 2 (5)¹ and is entitled to an order. For the purpose of the Adoption Act, 1950, and that subsection in particular, "residence" means actual de facto residence at a particular time; it does not mean permanent residence.

[*W. F. Waite* (for the Official Solicitor) intervening. In *In re W.*² *Evershed J.* made an order in favour of the wife (who

¹ Adoption Act, 1950, s. 1: "Subject to the provisions of this Act, the court may, upon an application made in the prescribed manner by a person domiciled in England or Scotland, make an order (in this Act referred to as an adoption order) authorizing the applicant to adopt an infant."

Section 2 (5): "An adoption order shall not be made in England unless the applicant and the infant reside in England, and shall not be made in Scotland unless the applicant and the infant reside in Scotland."

Subs. (6): "An adoption order shall not be made in respect of any infant unless—(a) the infant has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order; and (b) the applicant has, at least three months before the date of the order, notified the welfare authority within

"whose area he is for the time being resident of his intention to apply for an adoption order in respect of the infant."

Section 5 (1): "The court before making an adoption order shall be satisfied . . . (b) that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant."

Section 6: ". . . the court may, upon any application for an adoption order, postpone the determination of the application and make an interim order giving the custody of the infant to the applicant for a period not exceeding two years by way of a probationary period upon such terms . . . as the court may think fit."

² (1946) (not reported).

HARMAN J. was resident), and observed that the order might be varied in favour of her husband (who at the time was in Nigeria) if at any time he returned to this country.

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That observation has been taken to mean that the requirement that the applicant should be resident is satisfied if he or she happens to be in the country at the moment when the order is made, even though intending to be here for only a short time. In that case the order was varied in favour of the husband when he next returned on leave, although he intended to return to Africa within a few days, and orders have been made in similar circumstances in other unreported cases (heard in chambers) in 1950 and 1951.]

Buckley. The test, in deciding whether a person is resident for the purpose of the Adoption Act, 1950, is not the same as in the Income Tax Acts. Liability for income tax depends on whether a person has an established home in the locality; but for the purpose of the Act of 1950 the practice has been to hold that a person is resident in a place if he is to be found there at the material time. In *In re W.*² Evershed J. made an order in favour of the wife because she was actually living in the country: he did not consider whether she intended to live here permanently (though in fact that seems to have been the case).

If, however, the present practice is misconceived and the correct test for the purpose of the Act of 1950 is whether the applicant has an established home in this country, it is submitted that both applicants have satisfied the requirements of the subsection, for they have purchased a house and the evidence is that in about seven years' time both applicants will return to this country and reside here permanently. Meanwhile they have an established residence in this country to which they will return during the husband's periods of leave.

"Residence" is a word of ambulatory meaning: it must be interpreted according to the context in which it occurs. [He referred to *In re Bowie*³ and *Naef v. Mutter*.⁴] Normally it involves some degree of continuity, but there are two extremes. On the one hand, an applicant may have a settled home in which he is living; on the other, he may be a mere transient visitor without any intention of continuity, so that his "residence" may be only the actual presence here on a particular date. The latter would perhaps be insufficient "residence" for the purpose

² (1946) (not reported).

⁴ (1862) 31 L.J.C.P. 357, 359.

³ (1880) 16 Ch.D. 484.

of the Act of 1950, but there are degrees between these two extremes, and it is submitted that the requirement of the Act as to residence would be satisfied by an applicant who had a settled home in this country which was his basis of operations even though he was not living there continually. He must, in order to satisfy section 1 of the Act, be domiciled in this country and it is also necessary that he should be actually physically within the jurisdiction on the day when the order is made. Further, he will have had to show some continuity of residence in this country in order to satisfy section 2 (6), for although he need not be physically within the area of the local authority during the whole of the three months required by that subsection, he must retain control of the child. It is, however, submitted that the scheme of the Act does not require a more permanent residence. It does not contemplate the court's keeping a watch over an infant once an order for adoption had been made; therefore there is no reason why the applicant should be required to prove that he intends to reside permanently in this country. Section 5 (1) (b) suggests that the provision as to residence is not directed to the merits of the application but relates to jurisdiction. [He referred to *Reg. v. Hughes*⁵; *Reid v. Inland Revenue Commissioners*⁶; *Levene v. Inland Revenue Commissioners*⁷; *Inland Revenue Commissioners v. Lysaght*⁸; and to section 6 of the Act of 1950 providing for interim orders.]

W. F. Waite for the Official Solicitor. A person cannot be said to be "resident in England" for the purpose of the Act of 1950 at the time when the order is made unless he is not only living here but has no immediate intention of residing anywhere else. In *In re Bowie*⁹ it was said that words such as "resided" and "residence" are meaningless and can have a clear meaning only if construed in the light of the relevant statute itself. It seems impossible for a person to be "resident" both here and abroad for the purpose of the Act of 1950. If that be so, the wife cannot be said to be resident here any more than her husband, for her residence is that of her husband.

HARMAN, J. I should be disposed to reserve my judgment, but this is a matter of urgency for the applicants and, as I have come to a conclusion, I propose to state it and not wait to put it in the form I would have desired if I had had more leisure. The

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⁵ (1857) Dears & B. 188; 26 L.J. M.C. 133.

⁷ [1928] A.C. 217, 222.

⁸ [1928] A.C. 234.

⁶ (1926) 10 Tax C. 673.

⁹ (1880) 16 Ch.D. 480.

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application is made by a husband and wife, both asking for authorization to adopt an infant. I should have no hesitation on the merits in acceding to that application, but the question which confronts me in limine is whether I have the jurisdiction to do so. [His Lordship then stated the facts substantially as set out above and continued.]

The court was not told, except by a pure chance, that the child was to be taken to a part of the world which, *prima facie*, might be very undesirable for a child. In the application, the home to which the child was going was described as being in England, and it was said that the child was to occupy accommodation in the wife's mother's house, but in fact it was not intended that the child should occupy that accommodation at all. I do not at all question the good faith of the applicants, but it was a very unfortunate state of things. When the matter came before me, owing to an observation in a letter from a welfare officer, it occurred to me that the wife was intending to leave this country at once, and I concluded that she intended to leave the child in the care of someone else, but it was then disclosed that she was going to take the child with her out of the jurisdiction as soon as the order was made.

That raises questions of very great difficulty because section 2 of the Adoption Act, 1950, provides that an adopter must be resident in this country. That involves construing the word "resident."

The adoption legislation, so far as relevant, starts with the Adoption of Children Act, 1926, which was the principal Act until 1949. By section 2 (5) of the Act of 1926 "An adoption order shall not be made in favour of any applicant who is not resident and domiciled in England or Wales or in respect of any infant who is not a British subject and so resident." In that section, therefore, residence and domicile are connected. The Adoption of Children (Regulation) Act, 1939, dealt chiefly with adoption societies, but by section 8 (2) of that Act, a new section, as amended by the Postponement of Enactments (Miscellaneous Provisions) Act, 1939, s. 2 (1), was substituted for section 2 (5) of the Act of 1926. It provides: "An adoption order shall not be made (a) in favour of any applicant who is not both domiciled in England and Wales or in Scotland and resident in England or in Wales, or (b) in respect of any infant who is not both a British subject and resident in England or in Wales." So the child must be resident in England or Wales, but the adopter must be resident in England or Wales but might also be

domiciled in Scotland. Quite what point that was intended to meet, I do not know, but it did not, apparently, substantially alter the Act of 1926.

The scheme of the Act of 1950 was different. Section 1 provides that an application can only be made by a person who is domiciled in England or Scotland, nothing being said as to residence. Section 2 deals with restrictions on making adoption orders and does not refer to domicile, that being a pre-condition to the application. [His Lordship then read section 2 (5) and (6) and continued:] Apparently, therefore, there must be physical custody of the infant by the applicant for three months in England in order to satisfy subsection (6) (a).

By section 2 (6) (b) notification must be given to the welfare officer within whose area the applicant is for the time being resident of his intention to apply for an adoption order in respect of the infant; and section 32 provides that if he transfers his residence he must give notice to the welfare officer of the area to which he goes. Section 8 provides that an application for an adoption order may be made to the High Court or, at the option of the applicant, to a court of summary jurisdiction within the jurisdiction of which the applicant or the infant resides at the date of the application. Residence at the date of the application is specially mentioned in that provision.

By section 27 (1) (b) the adoption society is prohibited from placing the infant in the care and possession of a person resident abroad unless a licence has been granted, and section 27 (2) refers also to the delivery of the infant into the care and possession of a person resident in Great Britain. That shows that residence abroad and residence in England are treated as distinct for the purpose of this Act. In section 28 (1) there is a further reference to "a person who is resident in Great Britain" in connexion with the supervision which welfare authorities are required to have in cases pending an adoption, the person having charge of the arrangements pending adoption being called a custodian by section 28 (4). It is the duty of the custodian to give notice to the authority in the area in which he resides; and section 32 requires that if he changes his residence while the infant is in his care, he must give notice to the welfare authority in the area into which he is moving. Section 34 talks about child protection visitors who have a duty of inspecting the homes of custodians residing in the area of the authority employing the visitor. Section 39 talks of a person resident abroad, and section 40 also talks about a British subject resident abroad.

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Throughout the Act of 1950 residence in England or residence in Great Britain and residence abroad are contrasted as being two things which are the converse one of the other, and that seems to make it difficult to suppose that in this Act, unlike the fiscal Acts, a person may be resident in two places. For the purpose of the Income Tax Acts, if a person has two residences available to him and habitually resorts for more than temporary purposes to two jurisdictions, he may be resident in one place for part of the year and in the second place for another part; but that does not seem to fit the scheme of the Act of 1950.

The crucial matter therefore is the construction of section 2 (5) which prohibits an adoption order being made except in favour of an applicant who is "resident" in England. Mr. Buckley and Mr. Waite have submitted that "reside" is ambiguous. In *In re Bowie*,¹⁰ a bankruptcy case, James L.J. said¹¹: "There are cases in which it has been judicially decided, and I think rightly, that . . . 'residence' [has] no actual definite technical meaning, but that you must construe [it] in every case in accordance with the object and intent of the Act in which [it occurs]"; and with that Cotton L.J. agreed, adding that it is "an ambiguous word and may have different meanings according to the position in which it is found."

In *Levene v. Inland Revenue Commissioners*,¹² Lord Cave L.C. cited the Oxford English Dictionary,¹³ saying: "The word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'." The case immediately following in the same volume of the Law Reports, *Inland Revenue Commissioners v. Lysaght*,¹⁴ decided that residence or no residence was a question of fact for the commissioners. So here, in my judgment, it is a question of fact whether the applicants are resident in England.

In my judgment the fact is that neither the wife nor the husband is "resident" in England; they reside in Africa, where the husband's work is. They come home to England for holidays and stay with his or her parents. They intend to stay in a house of their own in the future and to come and reside here when his work is done and he can retire from his service. It is admitted, apparently, that the husband does not reside here, because he has

¹⁰ 16 Ch.D. 484.¹³ Ibid. 222.¹¹ 16 Ch.D. 484, 486.¹⁴ [1928] A.C. 234.¹² [1928] A.C. 217.

not persisted in his application, but the suggestion was that if and when he comes back here for a week, or lands here in an aeroplane and so is present here physically, he can be said to "reside" in England. HARMAN J.

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That seems to me a very doubtful proposition. Mr. Buckley did not wish to go quite so far and admitted that some degree of permanence was necessary; that a mere transient visitor who happened to be here on the day when the application was made, did not, by that, satisfy the qualification of the Act of 1950, but he said that the quantum of residence was a matter of degree and that residence for the time being was enough. He submitted that while the applicants were on leave in this country they were for the time being "resident" here. I should say they were for the time being staying here, and I do not think that is the same as being "resident."

The difficulty has arisen because of *In re W.*¹⁵ There is before me what purports to be a report which I must assume to be accurate. Apparently a considered judgment was given in chambers in that case which concerned a joint application by a Colonial civil servant and his wife to adopt a child. The applicants had a house in England of their own, in which they lived during such periods as he and his wife were in this country. In that case the wife intended to live, from the time when the child was given into her care, in their house in England, and did not propose to go back to Africa with her husband. It was therefore clear that she was resident in this country and there was no objection to making an order in her favour, and an order was, in fact, made. The point argued was whether an order could also be made in favour of the husband. It was argued that the husband had a home here, that for fiscal purposes he was "resident" because, having a home available in this country, he was resident here in any year during which he set foot in this country, according to the well-known ruling of the Income Tax Commissioners on that subject. He was not, however, here at the time that the application was made and Evershed J. declined to hold that he resided here. After considering the income tax decisions, which, I think, he regarded as artificial, he said: "As I construe the" the Adoption Act of 1939 "residence in fact within the jurisdiction is" "referable to the power given to the court to impose conditions on" "the making of an order as specified, for example, in section 4

¹⁵ (1946) (not reported).

HARMAN J. “ of the Adoption of Children Act, 1926. I therefore come to
 1951 “ the conclusion that I am unable to make an order in the male
 ADOPTION “ applicant’s favour.” He added: “ When the male applicant
 APPLICATION “ returns to this country, the order can be varied and made in
 52/1951, “ favour of both applicants.” I take those words to mean that
In re. when the male applicant had finished his Nigerian service and
 came back to live permanently in this country, he would then be
 qualified as “ a person resident ” here. The opposite view was,
 however, taken by a judge in chambers, for when the male
 applicant returned on leave in 1948, an order was made in his
 favour, although he intended to go back to Africa shortly after.

In the last two years apparently, the practice based on that
 case has been to hold that an applicant satisfies the requirement
 that he should be resident in this country if he is physically
 within the borders of the country at the moment when the order
 is made. On the other hand it has been assumed that even if
 the applicant has his residence, all his roots, his home and his
 avocations here, an order cannot be made in his favour if he is
 out of the country on the day when the judge happens to be
 asked to make the order. Indeed, it was lately suggested to me
 that a university don who had left the country for some two
 months in order to deliver some lectures would not be qualified
 to have an order made in his favour, because he was not resident
 here on the day when the application was made. I cannot believe
 that a view which leads to such a conclusion is right.

A more sensible meaning must be given to the word “ reside ”
 than that. Mr. Buckley suggests that the meaning is indicated
 by the three-month period imposed by section 2 (6) of the Act
 of 1950, being the period during which the applicant must be here
 and in possession and charge of the child. He submits that is
 the kind of residence which is meant in section 2 (5), so that the
 provision is satisfied if the applicant lives here for about three
 months before the order is made, because he would then be
 resident here for the time being. Mr. Waite suggests that you
 must not only be resident here, but have no immediate intention
 of being resident elsewhere. It is of course a striking fact that
 a child that is adopted does not become a ward of the court,
 nor is the court bound to attach conditions to the order about
 where the child shall reside in the future. The court’s duty is
 finished once it is satisfied that the adopters are suitable persons,
 that they have the means and, I suppose, accommodation at the
 time of the order, which seems likely to lead to the child’s
 advantage. It is submitted that it is immaterial that directly the

order is made the child may be going, for example, to Timbuctoo. In considering the merits of the application it is, of course, very material, but as a matter of jurisdiction I think it does not matter. The court must be able to postulate at the critical date that the applicant is resident, and that is a question of fact. Residence denotes some degree of permanence. It does not necessarily mean the applicant has a home of his own, but that he has a settled headquarters in this country. It seems dangerous to try to define what is meant by residence. It is very unfortunate that it is not possible to do so, but, in my judgment, the question before the court is in every such case whether the applicant is a person who resides in this country. In the present case I can only answer that question in the case of the wife by holding that she is not resident in this country; she is merely a sojourner here during a period of leave; she is resident in Nigeria, where her husband's duties are, and whither, in pursuance of her wifely duties, she accompanies him. I do not think either of the applicants is resident in England at present. They may be hereafter.

I regret this conclusion, particularly as, during the last two years, three orders have apparently been made on a footing which seems to be inconsistent with the judgment I have just felt bound to deliver. This question of jurisdiction is, however, vital, and I hold that there is no jurisdiction for me to make an order in favour of either of the applicants. The practice which has been followed in recent years of making an order in favour of an applicant whose avocation is abroad when he comes back to this country on a purely temporary holiday is wrong. I feel bound to refuse the application.

Ruling accordingly.

Case adjourned into chambers.

Solicitors: *Boulton, Sons & Sandeman; The Official Solicitor.*

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In re KEHR, DEC'D.

MARTIN AND ANOTHER *v.* FOGES AND ANOTHER.

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[1951 K. 131]

Administrator—Deceased domiciled abroad leaving widow and infant—Intestacy—Estate in United Kingdom—English administrators—Appointment of trustees of infant's share—Powers of maintenance and advancement—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 42; Trustee Act, 1925 (15 Geo. 5, c. 19), ss. 31, 32.

An intestate who died in India, but domiciled in Germany, left a widow and one child. Letters of administration to his estate in England were taken out in England by attorneys for the widow and they took out a summons asking whether they had power to appoint trustees under section 42, of the Administration of Estates Act, 1925, and, whether the trustees, if appointed, would have the powers of maintenance and advancement conferred on trustees by sections 31 and 32 of the Trustee Act, 1925.

Held, that section 42 of the Administration of Estates Act, 1925, applied not only to estates regulated as regards devolution by the law of England but also to estates regulated by the law of some other country. The administrators, although attorneys, had therefore power to appoint trustees and, if trustees were so appointed, they would, as trustees constituted according to English law, have the statutory powers of maintenance and advancement conferred by sections 31 and 32 of the Trustee Act, 1925, respectively.

In re Wilks [1935] Ch. 645 considered.

ADJOURNED SUMMONS.

The deceased, P. Kehr, was born in Germany in 1905. In 1929 he went to India where he remained until his death in 1947. apart from visits to the United Kingdom and to Germany. On February 5, 1936, he was married in London and, after a visit to Germany, returned to India where his son, the second defendant and the only child of the marriage, was born on January 28, 1937. On August 28, 1947, he died intestate in Bombay.

On May 31, 1950, letters of administration to his English estate were granted to the plaintiffs as attorneys for his widow. the first defendant, who married again on November 18, 1950.

It having been decided that the deceased died domiciled in Germany and that by the law of the domicile the infant was entitled to three-quarters of the estate and the widow to the rest, the summons asked whether there was power under the Trustee Act, 1925, or otherwise, to apply any part of the son's share

for his maintenance while under 21, or of the shares of either defendant for his or her advancement.

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J. A. Gibson for the attorneys for the administratrix.

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Boraston for the infant son. Administration continues for the purpose of the English courts until the infant is of age, but once the "mechanical" administration has been completed, the English administrators become trustees on behalf of the infant for his share of the English estate. As trustees constituted according to English law, they have the powers of advancement and maintenance given to trustees by sections 31 and 32 of the Trustee Act, 1925.¹ Alternatively, it is submitted that the personal representatives can appoint trustees under section 42 of the Administration of Estates Act, 1925,¹ who would then be able to exercise the statutory powers of trustees constituted according to English law. [Counsel referred to *In re Wilks*.²] It is significant that the definition of "trustee" in section 68 (17) of the Trustee Act, 1925, includes personal representatives.

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J. H. Lazarus for the widow adopted the argument on behalf of the infant. It is supported by *Ewing v. Orr-Ewing*,³ in which it was said that the *lex domicilii* does not prescribe the forum for the administration of the estate.

DANCKWERTS J. stated the facts and continued:—All the parties desire that trustees should be constituted in place of the plaintiffs who obtained as attorneys letters of administration in England on May 31, 1950, and that the income or corpus of the property to which the child of the deceased's marriage is entitled

¹ Trustee Act, 1925, s. 31 (1):
"Where any property is held by
"trustees in trust for any person . . .
"(i) during the infancy of any such
"person . . . the trustees may, at
"their sole discretion, . . . apply for or
"towards his maintenance, education,
"or benefit, the whole or such part,
"if any, of the income of that pro-
"perty as may . . . be reasonable."

S. 32 (1) (subject to qualifications),
"Trustees may at any time or times
". . . apply any capital money sub-
"ject to a trust, for the advancement
"or benefit, in such manner as they
"may, in their absolute discretion,
"think fit, of any person entitled to
"the capital . . . or of any share
"thereof, whether absolutely or con-
"tingently"

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Act, 1925, s. 42 (1): "Where an
"infant is absolutely entitled . . . on
"the intestacy of a person dying . . .
"after the commencement of this
"Act . . . to . . . any share [of the
"estate] . . . and such . . . share is
"not under the will, if any, . . .
"devised or bequeathed to trustees
"for the infant, the personal repre-
"sentatives of the deceased may
"appoint . . . trustees of such . . .
"share. . . . On such appointment
"the personal representatives, as
"such, shall be discharged from all
"further liability in respect of such
". . . share."

² [1935] Ch. 645.

³ (1883) 9 App.Cas. 34.

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should be available for the maintenance of that child during his infancy. The question is whether I have jurisdiction to authorize this appointment and whether the personal representatives, or any trustees who may be constituted by them or by the court, will have power to provide maintenance for the infant.

This is a matter of some difficulty on which there is very little authority. It is plain that the devolution of personal property belonging to a deceased who was domiciled outside England at the date of his death is regulated by the law of the country of domicile, that is to say in this case, the law of Germany. It is also established that the law of England regulates the administration of property which is in England. The question which I have to decide lies between those two considerations of law.

I am assisted by a decision of Farwell J. in *In re Wilks*.⁴ In that case, according to the headnote in the Law Reports, a testator "domiciled in Ontario, Canada, died possessed of estates "in Canada, the United States of America, France and England. "He left wills disposing of his estates in Canada, the United "States and France, but no will could be found disposing of his "estate in England. Letters of administration were granted to "his widow and the plaintiff. He left him surviving his wife "and three infant children. Included in his English estate were "a large block of shares in an English private company. Accord- "ing to the law of Ontario the sale of the portion of these shares "to which the infants were entitled could not be postponed by "administrators appointed in Ontario. The English adminis- "trators were anxious to postpone the sale of the shares, and "the plaintiff took out this summons asking whether they were "entitled, by virtue of section 33 of the Administration of Estates "Act, 1925, to postpone the sales:—*Held*, that the English "administrators were entitled to exercise the power to postpone "given to them by section 33, until they could get a good "discharge for the money in their hands from the persons "beneficially entitled to it."

Farwell J. decided in *In re Wilks*⁴ that, until the administration of the English assets is completed by the administrators, they continue to be administrators and have the powers which English law gives them as personal representatives and do not become subject solely to the powers which, in respect of devolution of the estate, are given by the law of domicile. That is all that Farwell J. decided.

⁴ [1935] Ch. 645.

In the course of his judgment he discussed section 42 of the Administration of Estates Act, 1925. [His Lordship read section 42 and continued:] The object, of course, of the section was to enable personal representatives to get a good discharge from all further liability in respect of a legacy or share of an estate to which an infant beneficiary was entitled, having regard to the fact that he could not legally give a discharge while he was still under the age of 21 years.

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Farwell J., considering section 42, said in *In re Wilks*⁵: “It is noticeable that that section appears to deal with a case of an infant becoming absolutely entitled on an intestacy of a person dying after the Act of 1925. If that section deals only with persons domiciled in this country, it seems to be a curious provision, because under the Act it is no longer possible for an infant to become absolutely entitled on the intestacy of a person domiciled in this country, since the Act itself makes an infant’s interest contingent upon his attaining 21 or marrying; therefore it looks as though this section is contemplating an intestacy in the case of a person dying domiciled abroad. Whether that be so or not, and I do not propose to found my judgment on that proposition, it appears to me that this is a matter of administration and that the administrators are entitled to exercise the power of postponement which is given them by the Act.”

The last observation refers to section 33 of the Administration of Estates Act, 1925, which Farwell J. held applied, but he gives reasons which seem to show conclusively that s. 42 applies not only to an estate regulated, as regards devolution, by the law of England, but also to an estate regulated by the law of some other country. I think, therefore, I am justified in concluding that section 42 of the Administration of Estates Act, 1925, applies to the administration of this estate, and accordingly the personal representatives, although attorneys, will have power to appoint trustees under section 42 of the Administration of Estates Act, 1925.

Assuming that personal representatives can appoint trustees under section 42, the question is whether trustees, so appointed, will have the powers conferred upon trustees by section 31 of the Trustee Act, 1925, of maintaining an infant beneficiary out of the income of the property of which they are trustees. That question, I think, is difficult to answer, but it seems to me that,

⁵ [1935] Ch. 645, 650.

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while it may be doubtful whether trustees constituted by the law of a foreign country would have the powers conferred upon trustees regulated by English law, including the powers conferred by the Trustee Act, 1925, the powers of trustees who are constituted under a provision of English law may be different; that is to say, they may have the power to appoint trustees conferred upon personal representatives by section 42 of the Administration of Estates Act, 1925.

It seems to me that trustees constituted under section 42 hold on trust for beneficiaries who are to be found according to the provisions of some foreign law, but whose powers and whose constitution depend upon the provisions of English law, and therefore, I see no reason why they should not have the powers of other trustees constituted according to English law and, accordingly, have the powers of maintaining infant beneficiaries conferred by section 31 of the Trustee Act, 1925.

If and when trustees have been so appointed, they will have the statutory powers of maintenance in respect of the infant defendant's share conferred upon trustees by section 31 of the Trustee Act, 1925, and the powers of advancement conferred by section 32 of the Act.

Declaration accordingly.

Solicitors for all parties: *Woodham Smith, Borradaile & Martin.*

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Evershed M.R.,
Jenkins and
Morris L.JJ.

In re GANSLOSER'S WILL TRUSTS.
CHARTERED BANK OF INDIA, AUSTRALIA AND
CHINA v. CHILLINGWORTH AND OTHERS.

[1950 G. 2533.]

Will—Construction—Gift to "relations" after prior life interest—Date of ascertainment of class—Whether joint tenants or tenants in common.

A testator by his will dated April 15, 1929, gave the residue of his estate which consisted wholly of personalty, "... to be divided "... one half to my wife's relations one half to my own relations "but not till the death of my wife ...". The testator died in 1929 and was survived by his wife who died in 1949. Neither the testator nor his wife had issue, but both had several collateral relations.

The construction of the testator's will depended upon the law in force in the Straits Settlements at the time of his death. Under

that law the law in force in England before 1926 was applicable, and it was conceded that under that law the term "relations" must be construed as those persons who would have taken under the Statutes of Distribution. On the two further questions on what date the class was to be ascertained and how the estate was to be distributed among the class so ascertained:—

Held, (1) that on the true construction of the will the rule in *Gundry v. Pinniger* (1851) 14 Beav. 94, that the date at which the class was to be ascertained was the date of the death of the propositus, was excluded, and the date for that purpose was the date of the death of the testator, and (2) that the class so ascertained took as joint tenants, for although where there is in the will an express reference to the Statutes of Distribution, those statutes determine not only the persons who are to take but also the shares and manner in which they are to take, where there is no such reference, the ordinary rule applies that where there is a gift to a class without words of severance, the members of the class take as joint tenants.

Eagles v. Le Breton (1873) L.R. 15 Eq. 148; 42 L.J.Ch. 362 followed.

In re Nightingale [1909] 1 Ch. 385 considered.

Decision of *Vaisey J.* [1951] Ch. 864 affirmed.

APPEAL from *Vaisey J.*¹

By his will dated April 15, 1929, Gustav Gansloser, hereinafter called "the testator," appointed the Chartered Bank of India, Australia and China, his executors, and, after giving certain directions, disposed of the residue of his estate as follows: "The remainder of my estate wherever situated . . . I desire to be divided as follows, viz., one half to my wife's relations one half to my own relations but not till the death of my wife. Until then my wife shall have the unrestricted use of the income of my said estate. I advise my trustees the Chartered Bank of India, Australia and China, London, to communicate with . . . , solicitors, Oxford, who will and can help my trustees in ascertaining my wife's surviving relations and in the case of my relations the Banking Institution" (he then named an institution in Würtemberg who, he stated) "can be relied upon to supply all necessary information."

The testator died on September 4, 1929, and was survived by his wife. His estate consisted wholly of personalty, partly in England and partly in Singapore. The will, which was a holograph document and unsigned, was admitted to probate on March 10, 1930, as a valid will by the law of Italy.

By an order dated April 27, made in former proceedings in the matter of the testator's estate,² it was declared, among other

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¹ [1951] Ch. 864.

² 1931 G. No. 1491.

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things, that the will effectively disposed of all the testator's estate; that the construction and effect of his will depended upon the law of Italy; that under Italian law the law operative in the Straits Settlements applied; and that his wife was entitled to a life interest in the whole of his estate in specie.

The law operative in the Straits Settlements at the time of the testator's death was the English statute law in force on November 26, 1826, and the common law and equity before that date. A decision by an English court on the construction of the testator's will would be followed in the Straits Settlements.

The testator's wife died on September 8, 1949. Neither the testator nor his wife had issue, but both had several collateral relations. The wife's relations who survived the testator and at the date of his death were her statutory next of kin, were her sister Mary, her brother the defendant Percy Chillingworth, her brother William, her brother Frank, six children of her deceased brother Thomas and her half-brother, the defendant John Butler Chillingworth. Her sister Mary and her brothers William and Frank predeceased her.

The bank as executors and trustees of the will took out this summons to have determined: (a) whether the persons entitled under the gift to the wife's relations were those persons living at her death who would have been entitled to her personal estate by virtue of the Statutes of Distribution (22 & 23 Car. 2, c. 10, and 1 Jac. 2, c. 17) had she died intestate, and, if so, whether in the proportions provided for by the statutes, or whether they took as joint tenants or tenants in common; (b) similar questions regarding the gift to the testator's relations in respect of his relations living at his death; and (c) generally, what persons were entitled to the testator's residuary estate and for what interests and in what shares or proportions.

The wife's relations, who were defendants to the summons, were first, her brother Percy Chillingworth; secondly, the six children of her brother Thomas; thirdly, the three children of her brother Frank, and fourthly, her half-brother John Butler Chillingworth.

Vaisey J. held first that the term "relations" must be construed as meaning those persons who would have taken under the Statutes of Distribution on intestacy; and that those persons formed an artificial class to be ascertained as at the death of the testator, and, in the case of the wife's relations, on the

hypothetical footing that she had died intestate at the date of his death and, secondly, that the members of the two classes so ascertained took as joint tenants and not in the shares prescribed by the statutes.

There was no appeal as to the half-share of the estate given to the testator's own relations. The three children of the wife's deceased brother Frank appealed. Under the decision of Vaisey J., they did not take a share.

F. E. Skone James for the three children of Frank. The first question to be decided is whether the wife's next of kin are to be ascertained at the death of the testator or at the death of the wife. It is submitted that the class to take should be ascertained at the wife's death. The second question is whether the wife's next of kin take as joint tenants or per stirpes in the manner laid down by the Statutes of Distribution. If the wife's next of kin are to be ascertained at the death of the testator, and if that class took as joint tenants, since there was no severance, Frank's share accrues to the shares of the other members of the class. If the class took as tenants in common per stirpes, the shares of the deceased sister and brothers would pass to their personal representatives. If the class of next of kin is to be ascertained at the wife's death, the persons to take are Percy Chillingworth, the children of Thomas, the appellants as the children of Frank and John Butler Chillingworth. The Custodian of Enemy Property is only interested in the half-share of the estate which passed to the next of kin of the testator.

It is submitted, first, that it is a rule of construction that a gift to "relations" is to be construed as a gift to the next of kin according to statute. In this case it is agreed that the Statutes of Distribution in force before 1926 are the statutes to be applied. Secondly, it is submitted that the class of next of kin are to be ascertained at the death of the *propositus*. A man can have no next of kin until his death. It appears from *Jarman on Wills* (7th ed.) 1601, 1616, *Hawkins on Wills* (3rd ed.) 135, and from *Theobald on Wills* (10th ed.), 246, that "relations" means next of kin according to the statutes, the class to take being ascertained at the death of the *propositus*. He referred to *Gundry v. Pinniger*³; *In re Ham's Trust*⁴; *Tiffin v. Longman*⁵;

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³ (1851) 14 Beav. 94.⁵ (1852) 15 Beav. 275.⁴ (1851) 2 Sim.(N.S.) 106.

C. A. *Eagles v. Le Breton*⁶; *In re Nash*⁷; *Mortimore v. Mortimore*⁸; and *In re Mellish*.⁹

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It is submitted that in the light of these authorities Vaisey J. was wrong in holding that the next of kin of the wife should be ascertained at the death of the husband. There is nothing in the language of this will which should lead the court not to follow these authorities. The will should be construed as if the testator had expressly given this share to the wife's next of kin under the Statutes of Distribution.

It is submitted further that not only must the class to take be ascertained in accordance with the Statutes of Distribution but that the manner in which that class takes should also be so ascertained. This was the principle applied in *In re Nightingale*¹⁰ and *In re Bridgen*.¹¹

B. L. Bathurst for the six children of Thomas. It is submitted that Vaisey J.'s decision is right. The difficulty arises here because of the passage in Jarman on Wills (7th ed.) 1602, 1603, in which the author expressed the opinion that the distribution should be in accordance with the statutes. That passage is not supported by the authorities. It is submitted that having resorted to the statutes to discover the class to take, then the class so ascertained takes, in the same way as any other class, as joint tenants. Having found the class to take, the names of the members of the class should be written into the gift. It is necessary to resort to the Statutes of Distribution to ascertain the class, it is not necessary to do so for any other purpose. The only authority in point is *Eagles v. Le Breton*.¹² That decision has never been overruled and should be followed.

J. L. Arnold, for Percy Chillingworth, supporting the appellants and replying on the second question. It is submitted that the authorities show that there is a distinction between the case where the gift is to the next of kin being the nearest blood relations, in which case the class take as joint tenants: *Withy v. Mangles*,¹³ *Lucas v. Brandreth* (No. 2),¹⁴ *Stockdale v. Nicholson*¹⁵; and the case where the gift is to the next of kin according to the statutes as in *In re Nightingale*,¹⁶ when the class take in the manner laid down by the statutes. In all the

⁶ (1873) L.R. 15 Eq. 148; 42 L.J. Ch. 362.

⁷ (1894) 71 L.T. 5.

⁸ (1879) 4 App.Cas. 448.

⁹ [1916] 1 Ch. 562.

¹⁰ [1909] 1 Ch. 385.

¹¹ [1938] Ch. 205.

¹² L.R. 15 Eq. 148; 42 L.J.Ch. 362.

¹³ (1841) 4 Beav. 358.

¹⁴ (1860) 28 Beav. 274.

¹⁵ (1867) L.R. 4 Eq. 359.

¹⁶ [1909] 1 Ch. 385.

authorities where the class is ascertained by reference to the statutes the distribution was stirpital. The only exception is *Eagles v. Le Breton*.¹⁷ There is a distinction on the authorities between the case of a gift to next of kin, being the nearest of kin, and to the next of kin according to the statutes. Where the statutes are brought in to construe the will either expressly or by implication the statutes should be introduced for all purposes. It is submitted that *Eagles v. Le Breton*¹⁷ is distinguishable, and that, if not, it was wrongly decided. Davey L.J., in *In re Nash*,¹⁸ was prepared to overrule it. *In re Bridgen*¹⁹ is inconsistent with *Eagles v. Le Breton*.¹⁷ *Tiffin v. Longman*²⁰ is not relevant. The court is asked to say that the current of authority lays down that where resort has to be made to the Statutes of Distribution in order to determine the class to take either as a result of an express reference by the testator to the statutes or by necessary implication, then the statutes determine also the shares in which the beneficiaries are to take. [He referred to *Thomas v. Hole*²¹; *Booth v. Vicars*²²; *Stockdale v. Nicholson*.²³]

R. R. A. Walker, for John Butler Chillingworth, did not argue.

F. E. Skone James in reply on the first point. It is submitted that Hawkins on Wills (3rd ed.), p. 135, supports Jarman on Wills (7th ed.), p. 1603, in stating that the authorities show that where a gift is to statutory next of kin the class to take must be ascertained at the death of the propositus.

Denys Buckley for the Custodian of Enemy Property.

K. J. T. Elphinstone for the plaintiffs.

EVERSHED M.R. [after stating the facts:] The question in this case concerns the effect of the provision for the division of the testator's estate between his wife's relations and his own relations. The problem is of a two-fold character: it is conceded that the word "relations," in a context such as that with which we are concerned, is given a restricted significance so as to save the gift from total invalidity. But the questions which we have to consider are, first, whether the class so restricted is to be ascertained at the date of the wife's death or at the date of the coming into operation of the will, namely, the testator's death;

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¹⁷ L.R. 15 Eq. 148; 42 L.J.Ch. 362.

¹⁸ 71 L.T. 5.

¹⁹ [1938] Ch. 205.

²⁰ 15 Beav. 275.

²¹ (1734) Cas.t.Talbot 251.

²² (1844) 1 Coll. 6.

²³ L.R. 4 Eq. 359.

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 1951 among the class so ascertained, is the estate to be distributed?

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On the first point, the nature of the restriction imposed by the law is set out in the passages which have been cited from Jarman on Wills (7th ed.), p. 1601, from Theobald on Wills (10th ed.), p. 246, and from Hawkins on Wills (3rd ed.), p. 135. It is put thus in Theobald (10th ed.), p. 246: "But the terms 'relations'—and then other phrases are referred to—'. . . are 'of indefinite meaning, and the courts, when compelled to determine the persons to take, have restricted them to relations capable of taking within the Statutes of Distribution, both as regards realty and personalty'; and one of the cases there cited is *Thwaites v. Over*.²⁴ A reference to the judgment of Mansfield C.J. in that case finds a prominent place in the statement of the principle in Hawkins on Wills (3rd ed.), p. 135. The passage from that judgment,²⁵ which is set out in Hawkins on Wills (10th ed.), p. 135, is this: "Although 'relation' is a word of very vague and general import, yet it has obtained a certain degree of ascertained meaning in the courts where questions of this sort have arisen with respect to personal property; that is, it means those who are entitled to take as relations under the Statute of Distribution. This rule of interpretation has been adopted to control the more extensive and lax sense of the word. The term then having obtained this construction in courts of equity, I do not see why it should not obtain the same construction in courts of law."

In the present case, applying that principle, and however the will is to be construed in reference to the two questions raised, regard must be paid not to the law of intestate succession as it is in England today, but to the old statutes, known compendiously as the Statutes of Distribution but more strictly as the statute of 22 & 23 Car. 2, c. 10, and the statute of 1 Jac. 2, c. 17, which regulated intestate succession until the change in the law in 1925. That is said for accuracy and as part of the necessary narrative: it does not affect the substance of the two questions which I have formulated. On both of them Mr. Skone James' argument, fundamentally, directed us in this way: that, since there is imported by the courts this artificial reference to the Statutes of Distribution, you must go, so to speak, the whole way and extract all the necessary inferences from the introduction that you would extract if the testator had himself said,

²⁴ (1808) 1 Taunt. 263.

²⁵ *Ibid.* 269.

instead of "relations," something to the effect that the division was to be among the persons entitled under the Statutes of Distribution. Thus, said Mr. Skone James, two things follow: First, that you can only ascertain the class of persons to be benefited by looking at the state of affairs at the death of the propositus—in this case, at the wife's death, for the Statutes of Distribution, applicable to the distribution of the estates of persons dying intestate, can have no sensible application to a person still living. Second, the reference also goes to the way in which the estate is distributed among the class so ascertained; regard must be had to the way pointed out by the statutes: in other words, in this case the half share with which we are concerned must be distributed among the persons found to be entitled under the statutes as tenants in common per stirpes. [His Lordship indicated the interests of the various parties, and continued:] I return to the first question: from the passage in Theobald on Wills (10th ed.), p. 246, it is clear that the court has adopted what is called a "rule" for the purpose of saving from invalidity through vagueness a gift expressed in favour of a class which would be so wide, according to its proper meaning, as to be incapable of any sensible or possible ascertainment; and, the rule being as it is, the question in the present case must be: What is the effect of the impact of the rule upon the particular language of this will? I agree with Mr. Skone James that in an ordinary case, and apart from something in the context which would lead to a different result, if a fund is given to "A's "relations," by which, by the operation of the rule, is meant those relations who would take under the Statutes of Distribution, *prima facie*, the class is constituted at A's death; since it is only then that the Statutes of Distribution properly provide an answer to the question notionally put. However, it is clear that a testator who uses this loose phrase may, by the context in which it is used, produce the result that the class is to be ascertained albeit by reference to the Statutes of Distribution, yet at some date other than that at which in ordinary circumstances the Statutes of Distribution would come into operation. I for my part agree with the judge that in this case the language used by the testator requires the class to be ascertained, not at the wife's death, but at the testator's own death. It creates an added artificiality, but that is not a sufficiently significant point to outweigh the inferences which flow from the language used.

There has been some discussion whether this rule (and I have so far tried to avoid using language which would prejudice the

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matter) is to be regarded as a rule of convenience or a rule of construction—it being assumed that there is some antithesis between the two. In a sense, it is a rule of construction: that is to say, it is a rule which the courts apply in construing wills where the word “relations” is used in such a context as the present. It is equally a rule of convenience, in the sense that it is a rule which the courts apply under compulsion of the argument *ab inconvenienti*, because on any other view the will would be rendered nugatory. I am not satisfied that, treating it as a rule of construction in the sense in which I have used it, you have to read the will as though the testator in fact had not used the word “relations,” but had himself inserted, in some language which has not been very precisely defined, a specific reference to the Statutes of Distribution. At any rate, I am unable to accept the view that, be it a rule of construction in that or in any other sense, the application of it overrides the inferences from the context in this particular will.

The first point to note is that the testator “desires” his estate “to be divided as follows.”; and then the two halves are designated. *Prima facie* it would, I think, be surprising that this testator intended the executors to set to work at once to find out the class of persons entitled to one half, but to wait for a long time—twenty years—before they started to discover who was entitled to the other half. It seems to me that the language contemplates the ascertainment once and for all at his death of the persons who will constitute the classes ultimately entitled to his estate. That is supported by the next few words that follow: “. . . but not till the death of my wife.” I think, if the idea had been that as regards part of the residue the persons to take were not to be and could not be discovered until the wife’s death, that would be a very remarkable way of giving effect to the intention. The testator contemplated an immediate operation of discovering the classes, and he added that, although those are the classes to take, they are not to enjoy the property until the death of his wife and until that event she is to have the unrestricted use of the income.

Some attention was also directed to the piece of advice which the testator incorporated in the will: “I advise my trustees the “Chartered Bank of India, Australia and China, London, to “communicate with . . . , solicitors, Oxford, who will and can “help my trustees in ascertaining my wife’s surviving relations “and in the case of my relations the Banking Institution”

(named) "can be relied upon to supply all necessary information." Mr. Skone James pointed to the distinction between "my wife's surviving relations" and his relations as indicating that the wife's relations were persons who would not be ascertained at the same time as his own. I think that that is to extract rather a lot from "surviving"; and against it there is the circumstance that this firm in Oxford, it is said, "will and can help my trustees." The present tense may be said to be inconsistent with the notion that the ascertaining who the relations were was to be postponed for perhaps a long period of time. At any rate, without more, I come to the conclusion arrived at by the judge that the wife's relations (as in the case of his own) were to be ascertained when the will came into operation at his death.

That leaves what I have thought the more difficult question; and, having regard to the answer I give to the first, the matter becomes in a sense more artificial. How, having found this class of persons, is the distribution to take effect? Vaisey J.'s opinion was that here, as is the case of a gift in favour of any other class without any words of distribution, the beneficiaries take as joint tenants. I am unable to satisfy myself that that view is not correct. I think that Mr. Bathurst is right when he says that the effect (for this purpose) of the application of the so-called rule is that you get, by the use of the phrase "my wife's relations," a class consisting of a number of persons who have been *ex hypothesi* ascertained—A, B, C, D, E and F—and there being nothing more—no words of distribution or severance—that class, so ascertained, according to the ordinary rules, take as joint tenants.

I think that that is the right analysis. It is not an easy matter, and the numerous decisions to which our attention has been directed have created in my mind a feeling of difficulty, because, accepting that construction, there must now be taken to be a fine distinction between cases of this type. I console myself by reflecting that on any view there are very fine distinctions; and, when the realms of artificiality are reached which are achieved in this case by applying this rule and construing the will so as to discover the class at a date which makes it a wholly artificial class, it is perhaps not surprising to find the distinctions which the cases illustrate. This much is clear: it all depends on the extent and significance of the reference that the rule instructs you to make to the Statutes of Distribution. Mr. Bathurst's argument is that the rule does no more than this: it says that the term "relations" being obviously too loose, you take it as

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meaning a much smaller class of relations, a class which is capable of ascertainment, namely, the class of relations which you find is the subject-matter of the legislation in the Statutes of Distribution: the rule does no more than enable you to discover the class: it says nothing thereafter as to how you proceed. On the other hand, Mr. Skone James and Mr. Arnold say that, once you introduce the Statutes of Distribution, by implication (or by application of the so-called rule of convenience, which is the same thing) you must go the whole way and say that the statutes provide for the method of distribution as well as the constitution of the class. The argument is most forcibly put when reference is made to cases in which a testator has directed that his property, or some fund left by him, should go "to my next of kin under the Statutes of Distribution"; for that formula, be it observed, indicates sufficiently the class to take but in terms says nothing about the method of distribution among the class.

In *In re Nightingale*,²⁶ which came before Neville J. in 1909, the gift was for practical purposes in that form, and he laid down that in such a case it was necessary and proper to extract from the reference to the Statutes of Distribution both the constitution of the class and the method of distribution among the class. After a reference to *Bullock v. Downes*²⁷ (in which, again, there was express reference to the Statutes of Distribution), Neville J. said²⁸: "In my opinion the rule which was there referred to was "that where there is a gift to a class to be ascertained by reference to the Statute of Distributions the shares are prima facie to be in accordance with the statute as well as the objects of the gift. "Of course a contrary intention may be expressed by the will." Then, after stating that the rule was a matter of inference, he concluded in this way: "I think, therefore, that no distinction ought to be founded upon the various forms of expression which one finds used in cases where the class are to be ascertained by a reference to the Statute of Distributions. I may repeat what I have often said before, that where a rule of construction exists, it seems to me the worst possible policy to draw nice distinctions between the words used. It seems to me the rule should be taken in as universal a way as possible in order that persons interested under wills may have some reasonable chance of knowing what the courts will hold to be their interpretation. I think, therefore, that I can draw no distinction between the words used in this case and the words used in the numerous

²⁶ [1909] 1 Ch. 385.²⁸ [1909] 1 Ch. 385, 388.²⁷ (1860) 9 H.L.C. 1.

"cases that have been cited to me in which it has been held that
 "a gift to a class to be ascertained by reference to the Statute
 "of Distributions is a gift to them as tenants in common and not
 "as joint tenants."

There is obviously great force in the argument that if the rule of convenience is a rule which inferentially introduces the Statutes of Distribution as the means of ascertaining the objects of the gift, then it is an unreal and fine distinction to say that, because there is no express reference by the testator himself to the statutes, therefore, in such a case as this, the objects are to take as joint tenants, whereas in the case where there is an express reference of some kind to the statutes by the testator, then the distribution is to be in accordance with the statutes. On the other hand, in the class of case in which the persons to take are next of kin, as distinct from next of kin according to the statutes, it is conceded that the general rule would apply, namely, that the class take as joint tenants. I mention that last case, because it appears that there will always be fine distinctions, distinctions perhaps no more sensible than the distinction between the two classes of case illustrated on the one hand by *In re Nightingale*²⁹ and on the other by the present case.

Against the weight of the judgment of Neville J. must be set another case, *Eagles v. Le Breton*.³⁰ That case has this marked advantage in that it is a case—and indeed the only case so far as researches have discovered—in which the point with which we are now concerned was directly raised. The relevant language of the will in *Eagles v. Le Breton*³⁰ was: "At the death of my sisters Anne Peppin and Jane Coucher the residue of my property is to pass to my relatives in America." Upon the question: Who were the "relatives in America"; was that a class capable of ascertainment and if so how, the answer was: By applying the rule which is admittedly applicable in the present case. To use the language of Lord Romilly M.R. in the report in the Law Journal³¹: "It was settled that under a gift of this description the class was to be ascertained at the testator's death; also that 'relatives' meant the persons who would take under the Statutes of Distribution."

The question then arose how this class would take. And I observe that Mr. Pearson is reported as arguing for certain persons in exactly the sense in which Mr. Arnold argued before us. "It is admitted," he said,³² "in this case that the word 'relative'

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²⁹ [1909] 1 Ch. 385.³¹ 42 L. J. Ch. 362.³⁰ L.R. 15 Eq. 148; 42 L.J.Ch. 362.³² Ibid. 362, 363.

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“ means the persons who would take under the Statutes of Dis-
tribution; that being so, they must take in the shares and in
“ the manner in which they would take under the statutes. They
“ take, therefore, as tenants in common. Whenever you have
“ either an express or an implied reference to the statutes, the
“ next of kin take as tenants in common. It is only under gifts
“ without reference to the statutes that the class take as joint
“ tenants, the class being then reckoned by the rules of the civil
law.” But that argument was rejected. The judgment of
Romilly M.R., the first sentence from which I have already read,
proceeded: “ It was true that when there was an express reference
“ to the statutes they would take as tenants in common in the
“ shares in which they would have taken on an intestacy. But
“ when there was no express reference to the statutes the case
“ was different. There was nothing then to prevent the ordinary
“ rule from applying, that under a gift to a class without words of
“ severance, all the members of the class take as joint tenants.”

That decision was given in 1873. It is true that in a later case,
In re Nash,³³ Davey L.J. spoke of it in terms indicating a little
doubt about its soundness in one (though not the presently
material) respect, but he had looked at a report in the Law
Reports,³⁴ which was very much briefer than that in the Law
Journal,³⁵ and which contained a mistake, a manifest error (not
relating to this particular point), and I think that the Lord Justice
was plainly misled by the mistake. I can find no warrant for
suggesting that the report in the Law Journal³⁵ is not in all
respects a correct report of what Lord Romilly M.R. decided.
Nor am I able to say that that case is inapplicable here because
the class of relations was limited by reference to their residence
in America. It is true that it added a further artificiality, but
no greater artificiality than in this case; nor in principle, as far
as I can see, was it any different from a gift, for example, to
the relations other than specified persons. Certainly the ratio
decidendi was in no way based on the American qualification
which the participants had to have.

Although this decision appears not to have been in accordance
with the view indicated in Jarman on Wills (7th ed.), at pp. 1602,
1603, I cannot find that it has ever been doubted in any later
case (save by Davey L.J. in the circumstances I have mentioned)
as a valid authority, and it has therefore stood, and may well
have been applied and adopted in other cases, over a period now

³³ 71 L.T. 5, 7.

³⁵ 42 L.J.Ch. 362.

³⁴ L.R. 15 Eq. 148.

extending to nearly eighty years. It was not cited, so far as we could see, in the case of *In re Nightingale*,³⁶ and if, therefore, the language of Neville J. might appear to cover such a case as *Eagles v. Le Breton*,³⁷ I think it must be taken with the qualification that his attention had not been directed to something which would have required him to limit the scope of his own judgment. At any rate, narrow though the distinction may be, I am not disposed to say, after this length of time, as we were invited to do, that *Eagles v. Le Breton*³⁷ ought to be treated as wrongly decided; and, since it is far nearer to the present case and in truth directly bears upon it, I think this court should now follow it. It does accord, as I think, with a principle no less sensible than the principle enunciated by Neville J. There is here, according to the language of the testator himself, no reference to the Statutes of Distribution: the statutes are introduced because the court, in order to save the will, is compelled so to construe the word "relations." But to read into this word not only a reference to the statutes for the purposes of discovering the objects, but also a direction that the division is to be in such shares and in the manner in which the persons concerned would take under those statutes, seems to me to be going beyond what the rule, strictly so called, authorizes—and the more particularly in a case in which, like the present, the class which is so ascertained is artificially ascertained by reference to the death, not of the propositus, but of the testator. As a general principle, gifts to classes without words of distribution are treated as gifts to the classes as joint tenants.

For those reasons I have reached the same conclusion as Vaisey J., and I think that accordingly the answer to the question is that the class of "wife's relations" is to be ascertained by asking who would have been the persons who would have taken her undisposed-of personal estate under the Statutes of Distribution had she died at the same date as the testator, and that those persons so ascertained take, like any other class, as joint tenants and not otherwise. The result of that is that the appeal fails and should be dismissed.

JENKINS L.J. I agree. It is common ground that the persons referred to in the will of this testator as "my wife's relations" and as "my own relations" must be taken to mean the next of kin of the testator's wife and himself respectively, according to

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³⁶ [1909] 1 Ch. 385.³⁷ L.R. 15 Eq. 148; 42 L.J.Ch. 362.

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the relevant Statutes of Distribution. It is also common ground that the law to be applied in the construction of this will is English law as it stood before the property legislation of 1925, and in particular, before the passing of the Administration of Estates Act, 1925.

Two questions, which have been debated before us, do, however, arise with respect to the half of the estate given by the testator to his wife's relations, the first being at what date should the wife's relations (that expression being interpreted in the way I have mentioned) be ascertained, and the second, in what manner should those persons take, whatever the proper date of ascertainment may be? The first of these questions involves consideration of what is sometimes known, I think, as the rule in *Gundry v. Pinniger*.³⁸ That rule comes to this: that, inasmuch as the proper time for the operation of the Statutes of Distribution in relation to the estate of any person is the death of that person, therefore, *prima facie*, the reference to next of kin according to the statutes involves by implication the ascertainment of those persons at the proper time, namely, the death of the person whose next of kin according to the statutes are referred to. There is no doubt, I think, that this rule is, *prima facie*, of general application and should be followed unless there is something in the terms of the particular will under consideration which shows that it was not intended that the ascertainment of the next of kin of the *propositus* according to the statutes should take place as at the death of the *propositus*.

In this particular case, I agree with my Lord that the language and scheme of the will make it sufficiently plain that the testator's intention was that both his wife's relations and his own relations should be ascertained at one and the same time, namely, as at the testator's death. My reasons for that view are these. The testator's direction is: "I desire [the remainder of my "estate] to be divided as follows, viz., one half to my wife's "relations one half to my own relations." That, on the face of it, is a direction for an immediate division to be effected at the testator's death and to be effected once and for all. It is a division to be made as to one half to his wife's relations and as to one half to his own relations—that is to say, to the next of kin according to the statutes of two different people, the testator himself and his wife, who may or may not survive him. In view of this direction for immediate distribution, it seems to me that

³⁸ 14 Beav. 94.

prima facie the proper conclusion must be that those persons, the objects of the distribution, are to be ascertained at one and the same time, namely, the testator's own death.

I think that that conclusion is reinforced by what follows. The testator continues: "... but not till the death of my wife." Those words were relied on in argument as equivalent to a gift of a life interest to the wife preceding the direction to divide, which should, it was said, be regarded as if it had been expressed as a gift in remainder expectant on the wife's death. In my view, however, there is for the present purpose a real distinction between a disposition in that form and the language actually used by this testator. The word "but" I regard as highly significant. The testator, having directed a division which, according to its terms is capable of being immediately carried out, goes on to say that this operation is to be postponed until a certain date: that he does by the words: "... but not till the death of my wife." Moreover, if the gift of "one half to my wife's relations" is to be construed as a gift "to my wife's next of kin according to the statutes ascertained as at her death," the words "... but not till the death of my wife," though not on that construction deprived of all meaning, would not as it seems to me to be wholly appropriate.

Finally, there is the passage at the end of the will advising the trustees to communicate with a firm of solicitors at Oxford, with the statement that this firm "will and can help my trustees in ascertaining my wife's surviving relations." It seems to me that that does to some extent support the conclusion to which I have come, for it suggests that on the death of the testator his trustees could write to the solicitors in question and receive information as to the wife's relations then living. That, to my mind, is the implication of this passage, and it suggests that the relations of the testator's wife, who were to be entitled to take under the gift, were persons who could be ascertained at the testator's death.

For these reasons, in my judgment, there is enough in this particular will to exclude the so-called rule in *Gundry v. Pinniger*,³⁹ with the result that the wife's relations and the testator's own relations should both be ascertained at one and the same time, that is to say, as at the death of the testator, and that it would be wrong to postpone the ascertainment in the case of the share given to the wife's relations until the subsequent event of the wife's death.

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³⁹ 14 Beav. 94.

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It remains to consider the second question, that is to say, in what manner should the wife's relations take? That involves a consideration of what is sometimes called the rule in *Bullock v. Downes*,⁴⁰ the effect of that rule being that where there is a gift by reference to the Statutes of Distribution, those statutes determine not only the persons who are to take but also the shares and the manner in which they should take. As was said by Neville J. in the case of *In re Nightingale*,⁴¹ to which my Lord has already referred: "This case depends upon what is the true rule of construction recognized by the House of Lords in the case of *Bullock v. Downes*.⁴⁰ That there was a rule recognized in that case there can be no doubt, and the question is what is the extent of it."

To narrow the question down in its application to the present case, the problem is whether the rule extends to a case in which there is no express reference at all to the Statutes of Distribution—a case in which the gift itself, so far as the language of the will goes, is simply a gift to "relations." That is a question on which there is little helpful authority and on which there seems to be some difference of opinion amongst the writers of the textbooks. In the existing somewhat unsatisfactory state of the authorities, I agree with my Lord that the proper course is to follow the case of *Eagles v. Le Breton*⁴² to which he has referred. In that case, if I might be excused for reading the passage again, Romilly M.R. in his judgment said⁴³: "... when there was no express reference to the statutes the case was different. There was nothing then to prevent the ordinary rule from applying, that under a gift to a class without words of severance, all the members of the class take as joint tenants. That being so, and some having died without severing, the survivors would take the whole."

That decision commends itself to me as being in accordance with common sense and in accordance with the basic principles of the construction of wills. The rule, whether it be called a rule of construction or a rule of convenience, under which the word "relations" is held to be limited to the next of kin of the propositus according to the statutes is an artificial rule which the court in its benevolence has adopted to prevent a testator's disposition failing from uncertainty. That was considered sufficient justification for imputing a wholly conventional and

⁴⁰ 9 H.L.C. 1.⁴¹ [1909] 1 Ch. 385, 387.⁴² L.R. 15 Eq. 148; 42 L.J.Ch. 362.⁴³ 42 L.J.Ch. 363.

artificial intention to the testator by limiting his meaning of the word "relations," or the meaning he might attach to the word "relations," to the next of kin according to the statutes. The alternative of uncertainty was the justification for the procedure. But, that procedure having been gone through and the problem of uncertainty thus resolved, I cannot, speaking for myself, see what justification there can be for going on to impute to the testator a further entirely artificial intention that the fund or subject-matter of the gift should be divided amongst the next of kin according to the statutes in the shares and manner provided for by the statutes. That is a matter with which uncertainty has nothing to do; and, speaking for myself, in a case of this sort, where there is a gift to "relations," and the reference to the Statutes of Distribution is imported simply and solely by force of the benevolent rule of the court, I think there is no sufficient justification for applying it beyond the point necessary to avoid uncertainty. Once that is done, for my part, I would hold the rule to be exhausted, and that the gift, limited by force of the rule to persons answering the description of the next of kin according to the statutes, should take effect like any other gift; that is to say, if, as here, it is a gift without words of severance, it should be treated as operating to create a joint tenancy.

There is nothing in the authorities, so far as I can see, to preclude us from following *Eagles v. Le Breton*⁴⁴ in the present case, and, as the reasoning in that judgment commends itself to me as being sound law and good sense, in my view it should be followed. Accordingly, I agree with my Lord that this appeal fails, with the result which he has indicated.

MORRIS L.J. I find myself in full agreement with the judgments which have been delivered.

Appeal dismissed.

Solicitors: *Lethbridges; Gordon, Dadds & Co.; J. D. Langton & Passmore; Robins, Hay & Waters; Treasury Solicitor; Linklaters & Paines.*

B. A. B.

⁴⁴ L.R. 15 Eq. 148; 42 L.J.Ch. 362.

C. A.

1951

CHANCERY DIVISION
GANSLOSER'S
WILL
TRUSTS,
In re.
CHARTERED
BANK OF
INDIA,
AUSTRALIA
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ROX-
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1951
Oct. 31;
Nov. 1.

In re POMFRET'S SETTLEMENT.
GUEST AND ANOTHER *v.* POMFRET AND ANOTHER.

[1950 P. 927]

Settlement—Tenant for life and remainderman—House requisitioned during war—Damage during requisition—Compensation income not capital—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 81—Compensation (Defence) Act, 1939 (2 & 3 Geo. 6, c. 75), s. 2 (1) (b).

Compensation paid under section 2 (1) (b) of the Compensation (Defence) Act, 1939 in respect of damage done to settled property during occupation by military authorities is a casual profit, retainable by the tenant for life. Section 81 of the Settled Land Act, 1925, which provides that money "which ought . . . to be . . . treated as capital, shall . . . be deemed to be . . . capital money . . ." does not give the court a discretion to decide what in fact is capital money.

In re Williams' Settlement [1922] 2 Ch. 750 followed.

ADJOURNED SUMMONS.

An estate known as Mystole Estate was settled by way of a strict settlement dated May 13, 1935. A house on the settled estate was requisitioned from 1939–1946 by military authorities. Damage was done to the house by reason of the requisition, and £7,000 was paid to the tenant for life as compensation under section 2 (1) (b) of the Compensation (Defence) Act, 1939.¹ The tenant for life under the settlement was without impeachment of waste. The question on the summons was whether the tenant for life was obliged to treat the sum of £7,000, or any part of it, as capital.

D. H. McMullen for the plaintiff.

F. B. Alcock for the tenant for life. On the authorities the tenant for life is entitled to the compensation as a casual profit. It is none the less casual because it represents compensation for damage done to the inheritance. A tenant for life under a strict settlement who is unimpeachable of waste is entitled to retain a

¹ Compensation (Defence) Act, 1939, s. 2 (1): "The compensation payable under this Act in respect of the taking possession of any land shall be . . . (b) a sum equal to the cost of making good any damage to the land which may have occurred during the period for which posses-

sion thereof is so retained . . . no account being taken of fair wear and tear or of damage caused by war operations. . . . (3) Any compensation under para. (b) of sub-s. (1) of this section . . . shall be paid to the person who is then the owner of the land."

casual profit for himself: see *In re Lacon's Settlement*,² where the tenant for life was held to be entitled to damages for breach of covenant to repair. That case turned on the fact that the tenant for life was unimpeachable for waste. The decision was the other way in *In re Pyke*,³ but that case was distinguished from *In re Lacon's Settlement*² as the tenant for life was not a tenant for life in the ordinary sense, but a person entitled with others to the income of the residuary estate.

Those cases were before the legislation of 1925. Section 80 of the Settled Land Act, 1925,⁴ overrules *In re Lacon's Settlement*.⁵

Sargant J. held in *In re Williams' Settlement*⁶ that compensation paid under the Indemnity Act, 1920, for damage to property subject to a strict settlement was a casual profit. That case is indistinguishable from the present one.

The Compensation (Defence) Act, 1939, in so far as is material, assists the contention for the tenant for life. [He referred to section 2 of the Act of 1939.]

R. J. S. Thompson for the tenant in tail in remainder. The compensation is not a casual profit to which the tenant for life is entitled. *In re Williams' Settlement*,⁶ on the face of it, appears to be against that contention. It is not suggested that *In re Williams' Settlement*⁶ was wrongly decided, but it is a decision on the facts of that case and the law as it then stood.

Both *In re Lacon's Settlement*⁷ and *In re Williams' Settlement*⁶ were cases concerning legal tenants for life: see also *In re Pyke*⁸; a tenant for life was not a trustee for anyone at that time, but now a tenant for life as the estate owner is a trustee for those concerned. The whole basis of the decision in *In re Lacon's Settlement*⁷ turned on the fact that the tenant for life was the reversioner suing in his own right and was a trustee of anything which he received. *In re Williams' Settlement*⁹ was

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² [1911] 2 Ch. 17.

³ [1912] 1 Ch. 770.

⁴ Settled Land Act, 1925, s. 80:

"(1) Money, not being rent, received
"by way of damages or compensation
"for breach of any covenant by a
"lessee . . . shall, unless in any
"case the court . . . otherwise
"directs, be deemed to be capital
"money arising under this Act. . . .
"S. 81: "Any money which after
"the commencement of this Act arises
"from settled land otherwise than

"under this Act . . . and which
"ought, as between persons interested
"in the settled land, to be or to have
"been treated as capital, shall . . .
"be deemed to be or to represent
"capital money arising under this
"Act. . . ."

⁵ [1911] 2 Ch. 17.

⁶ [1922] 2 Ch. 750.

⁷ [1911] 2 Ch. 17.

⁸ [1912] 1 Ch. 770.

⁹ [1922] 2 Ch. 750.



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decided by analogy with *In re Lacon's Settlement*.¹⁰ The latter case was expressly overruled by section 80 of the Settled Land Act, 1925.

*In re Williams' Settlement*⁹ is also distinguishable because compensation under the Act of 1920 was for personal loss to the tenant for life, and not for damage to the inheritance. Compensation under the Act of 1939 is for damage to the inheritance.

It is submitted that under section 81 of the Settled Land Act the court has a discretion to decide whether a payment is capital or income. That section of the Settled Land Act like section 80 was new law. The object of section 81 may be to give the court power to review the whole matter on equitable principles, and in a proper case to disregard the rule as to casual profits: see Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. 2, p. 1119.

ROXBURGH J. The tenant for life under the settlement is, and was at all material times, Virgil Pomfret the first defendant. Since the legislation in 1925 he cannot have a legal life estate; his life estate must be equitable, but he is by cl. 3 of the settlement made unimpeachable of waste. On the settled estate was a house which was requisitioned by the military authorities in October, 1939, and an occupation rent was paid. In the summer of 1946 the military authorities gave up occupation. Considerable damage was found to have been done during their occupation and the sum of over £7,000 was obtained by the tenant for life by way of compensation for that damage.

In 1948 the house was sold for £5,500, and it is obvious that the price would have been much greater—how much greater one cannot tell—if the damage in question had not been done.

The question is: Is the tenant for life, who under the Act of 1939 was undoubtedly the proper claimant for compensation and which, therefore, was properly received by him, under any equitable obligation to treat any part of it as capital and held upon the trusts of the settlement?

If I were unfettered by authority, I should have no doubt what my decision ought to be. It is plain that the damage done during the occupation seriously depreciated the value of the house with the result that it realized far less than it would otherwise have realized. Why in those circumstances no part of the compensation should be attributed to capital I should, apart from

⁹ [1922] 2 Ch. 750.

¹⁰ [1911] 2 Ch. 17.

authority, be at a loss to understand. It is true that the tenant for life is without impeachment of waste, but it does not seem to me that this is a question of waste by the tenant for life. The waste was by the military authorities who, under statutory powers, took possession of the trust property, and if, as I assume, the compensation was exactly equivalent to the damage done, and if, as I should have thought, one ought to treat the inheritance and the compensation money as an entity, there has been no waste. There has been neither profit nor loss.

Again, were it not for authority, I should find difficulty in understanding how this sum could be called a casual profit. It may be casual, though, apart from war time, damage of this sort is frequently done. I am quite prepared to think it is casual, but why is it a profit? If the compensation money is precisely equivalent to the damage done, there is neither profit nor loss. If the compensation money exceeds the amount of the damage done, there may be some profit; but the profit is the difference between those two figures.

However, I consider myself to be bound by the decision in *In re Williams' Settlement*.¹¹ That was a case extremely like the present which occurred under the Indemnity Act, 1920. The case, in my view, is indistinguishable from the present. A park which was subject to a strict settlement was occupied by the military authorities, and compensation was awarded under the Indemnity Act, 1920, for the damage sustained by reason of that occupation. There was nothing in the Act which provided what was to be done with the compensation when it had been received.

The ratio decidendi of the judgment of Sargant J. is this¹²:
 “ Assume that the military authorities had been in the position
 “ of private individuals and had not had the protection of the
 “ Royal Prerogative. If then they had entered and injured the
 “ park and thereupon the tenant for life not being impeachable
 “ of waste had sued and recovered damages, *In re Barrington* ¹³
 “ shows that any damages so recovered would have been retain-
 “ able by the tenant for life and would not have belonged to the
 “ successive owners of the settled land notwithstanding the
 “ damage to the inheritance. So by analogy it seems to me that
 “ the compensation awarded in respect of the damages done by
 “ the Crown might well have been intended to follow the same
 “ rule. If that be so, that may explain the absence from the

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¹¹ [1922] 2 Ch. 750.

¹³ (1886) 33 Ch.D. 523.

¹² *Ibid.* 757.

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"Indemnity Act, 1920, of any provision that amounts paid by way of compensation for injury to settled property are to be held on account of the persons successively entitled. Further, in my opinion the money received in respect of the damage to the park is a casual profit. It is hard to think of anything of a more casual nature. It is something received by reason of an event which I hope is not likely to recur, at any rate for many years to come. On general principle, therefore, and upon consideration of the origin of this particular sum of money and of the absence of any provision in the Indemnity Act providing for any other destination for this money, I hold that the tenant for life being unimpeachable of waste is entitled to retain the amount recovered by him as compensation for the injury to the park."

I am unable to see any difference between that case and the present which would enable me to reach a different conclusion. Counsel may suggest that in fact this money was not a profit at all, but Sargant J. has held that it was. It is useless to argue that *In re Barrington*¹³ does not really support the conclusion of Sargant J. On that point I express no opinion because I cannot say, even if I thought so, that it did not, because Sargant J. has said that it does.

Mr. Thompson has suggested that there are four reasons why I should not consider myself bound by *In re Williams' Settlement*.¹⁴ The first I have already considered. He says it was not a casual profit. Secondly, Mr. Thompson said that there is an essential difference between *In re Williams' Settlement*¹⁴ and the present case, namely, that in *In re Williams' Settlement*¹⁴ the tenant for life had a legal life estate; whereas in the present case, he has only an equitable life estate. In my judgment, the decision in *In re Williams' Settlement*¹⁴ does not turn on that point; in fact, in stating his reasons, Sargant J. does not even mention that he was legal tenant for life, though in fact he was. What it does turn on is his unimpeachability for waste which, according to the reasoning of Sargant J., was the relevant consideration in connexion with this subject-matter. Thirdly, it was submitted by Mr. Thompson that there is the difference that the Indemnity Act, 1920, was merely to compensate the claimant for his own personal loss, whereas the compensation to be awarded under the Act of 1939 is compensation for damage to the inheritance. The argument that the Act of 1920 was confined

¹³ (1886) 33 Ch.D. 523.

¹⁴ [1922] 2 Ch. 750.

to claims by the claimant for his own personal loss was put forward by counsel on one side and opposed by counsel on the other side, and it is plain that Sargant J. did not accept it. If he had, it would have been the obvious first ground of his decision. Moreover, the very way in which he states his conclusion shows that he was regarding the money as payable in respect of damage to the inheritance. I do not feel able, therefore, to distinguish *In re Williams' Settlement*¹⁴ on that ground. Lastly, Mr. Thompson relies upon section 81 of the Settled Land Act, 1925, which, of course, was not in force at the date of *In re Williams' Settlement*.¹⁴

I do not think that he can find much comfort in that section. To rely on that section is to beg the question. If the compensation ought as between the persons interested in the settled land to be treated as capital, then the section would apply. But the section cannot assist the court in determining what ought to be treated as capital. Mr. Thompson suggested that the effect of that section was to give me a discretion in the matter unfettered by any previous authority. If I thought that it gave me such a discretion, I should certainly decide in his favour. But I cannot believe that the section gives me any such discretion. Accordingly, I must decide, with the reluctance which must already have become apparent, that this compensation money belongs in equity to the tenant for life.

Declaration accordingly.

Solicitors: *A. F. & R. W. Tweedie; Long & Gardiner; Lawrance, Messer & Co.*

I. G. R. M.

¹⁴ [1922] 2 Ch. 750.

In re BEIT.

BEIT *v.* INLAND REVENUE COMMISSIONERS.

[1951 B. 939]

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1951
Oct. 17,
18, 19;
Nov. 9.

Revenue—Will—Estate duty—Annuity—Purchase by executors, with consent of annuitants, from residuary legatees of annuities corresponding to those given by the will—Annuities secured by personal covenant only—Acceptance by each annuitant of charge on one such annuity in exoneration of rest of estate—Property not deemed to pass on death—No estate duty payable—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2 (1) (b), 7 (7)—Finance Act, 1940 (3 & 4 Geo. 6, c. 29), s. 43.

Evershed M.R.,
Jenkins and
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A testatrix, who died in 1946, by her will bequeathed a number of life annuities, including an annuity of £52 12s. to E. N. C. The testatrix directed her trustees to appropriate a fund sufficient by its income to provide for the annuities. She directed that the residue of her estate should, after the payment of certain deferred legacies, be divided equally between her three children, and that, subject to the payment of the annuities, the annuity fund should be held on the same trusts as the residue of her estate.

The testatrix's estate was insufficient to constitute an annuity fund in accordance with the provisions of the will. The executors of the will by letter of April 23, 1947, wrote to E. N. C. explaining the position and saying that, if the annuitants agreed, the executors proposed to purchase annuities from the testatrix's children equal to those payable under the will, the security for the payment being the children's personal covenant, the annuities so purchased being used to pay the annuities given by the will and that the remainder of the estate would be distributed. A form of letter agreeing to that arrangement was enclosed. E. N. C. signed that letter dating it April 30, 1947. By that letter she agreed that the executors should purchase an annuity from the testatrix's children and that they should "hold the annuity so purchased as sole security for the payment of my annuity and distribute the remainder of the estate free from any claim by me." Similar letters were sent by the executors to the other annuitants who also wrote similar letters of agreement. Effect was given to that arrangement. By a deed of covenant dated July 26, 1947, the three children, in consideration of the transfer to them of £60,904 in cash and investments being part of the residuary estate, covenanted with the executors to pay to them annuities corresponding to the annuities given by the will for the lives of the respective annuitants. The sum of £60,904 represented the actuarial value of the annuities. After the execution of that deed, the executors distributed the balance of the residuary estate.

From the date of the deed of covenant, the children paid the annuities to the executors, who duly paid E. N. C. her annuity down to the date of her death on November 18, 1947. The Crown claimed estate duty on E. N. C.'s death on the ground that the mode of providing for her annuity proposed by the letter of April 23, 1947, and agreed to by her letter of April 30, 1947, and implemented by the deed of covenant involved a disposition or determination of her annuity within section 43 of the Finance Act, 1940, and by virtue of that section, in conjunction with section 2 (1) (b) of the Finance Act, 1894, duty must be paid on the appropriate slice of residue ascertained in accordance with section 7 (7) of the Act of 1894.

Held, (1) that the answer to the Crown's claim for duty depended primarily on the true construction and legal effect of the scheme embodied in the letters of April 23 and 30, 1947, and in the deed of covenant so far as that deed showed that the scheme agreed to by E. N. C. was in fact carried out. Liability to duty must be established by reference to the true legal effect of the transaction in the form it actually took, and not by a process of equating the

transaction as actually carried out to some other transaction of different legal effect by means of which a substantially similar result would, for all practical purposes, have been achieved and which, if it had been the transaction actually carried out in the present case, would have attracted duty.

Inland Revenue Commissioners v. Duke of Westminster [1936] A.C. 1 applied.

(2) That the true legal effect of the arrangement of 1947 was:—
 (i) that E. N. C.'s will annuity was not disposed of or determined but remained on foot; (ii) that with E. N. C.'s consent a part of the residuary estate invested in a particular way, that is in the purchase by the executors from the residuary legatees of the corresponding covenanted annuity, was appropriated as the sole security for payment of her will annuity in exoneration of the remainder of the estate; (iii) that no contractual relationship whatever was set up between E. N. C. and the residuary legatees, the obligation undertaken by the latter being exclusively an obligation to the executors to pay them the several covenanted annuities; and (iv) that E. N. C.'s rights in respect of her annuity continued to be those of an annuitant under the testatrix's will against the executors and trustees of that will, modified only to the extent that a particular asset of the residuary estate, in the shape of the corresponding covenanted annuity, had, with her consent, been appropriated in exoneration of the remainder of the estate.

(3) That, where an annuitant consented to the appropriation of part of residue to answer his annuity in exoneration of the remainder of the residue, the annuity was not disposed of or determined within section 43 of the Finance Act, 1940 quoad the part of the residue so released.

(4) That, there having been no disposition of E. N. C.'s annuity, section 43 of the Finance Act, 1940, did not apply and estate duty did not become payable under section 2 (1) (b) of the Finance Act, 1894.

(5) That the deed of covenant of July 26, 1947, was admissible in evidence as throwing light on the true nature of the transaction with E. N. C.

Decision of Vaisey J. [1951] W.N. 325 affirmed.

APPEAL from Vaisey J.¹

The following statement of facts is taken substantially from the judgment of Jenkins L.J.:

Dame Lilian Beit by her will dated December 21, 1945 (so far as is material for the present purpose), appointed her son Sir Alfred Beit, Philip Rose Johnston and Louis Edward Pendryrs Tylor (three of the five plaintiffs in the proceedings) to be her executors and trustees, and after giving (by cll. 4 and 5) a number of specific and pecuniary legacies, all free of duty, gave (by cl. 6) to each of twenty-five named persons annuities, free of duty, of

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such annual amounts as after deduction of income tax in the manner thereafter stated should leave the respective amounts mentioned opposite their respective names, the list of names and annual amounts including in particular "The said Estelle Newton "Carter £52 12s. Od.," this being the annuity to which the present proceedings related.

By cl. 7 and 8 the testatrix gave all her real and personal estate not otherwise disposed of to her trustees on the usual trusts for sale and to pay her funeral and testamentary expenses, debts and legacies.

By cl. 9 of her will the testatrix provided as follows: "Out "of the residue of such moneys (hereinafter called 'the residuary "fund') my trustees shall invest in any manner hereby autho-
 "rized and appropriate so much thereof as shall be requisite for
 "providing a fund (hereinafter called 'the annuity fund') which
 "shall be sufficient by its income at the date of appropriation to
 "provide the annuities hereinbefore given together with any like
 "annuities payable under any codicil hereto on the assumption
 "that the standard rate of tax is the standard rate at the date
 "on which the annuity fund is appropriated and my trustees
 "shall hold the annuity fund upon the trusts hereinafter declared
 "concerning the same."

By cl. 10 the testatrix provided that the setting aside of the annuity fund should fully exonerate all the remainder of her residuary estate from the payment of the annuities, and accordingly that when such fund should have been set aside in full her trustees should apply the balance remaining of the residuary fund in paying a number of deferred legacies, all free of duty, and, subject thereto, should divide the residue of such moneys equally between her three children, Sir Alfred Beit, Alice Angela Bull and Lilian Muriel Munro (the two last-named being the remaining plaintiffs in the present proceedings).

Clause 11 contained a number of directions concerning the annuity fund which was (by sub-cl. (a)) to be held on trust to pay the annuities out of the income and, in the event of the income being insufficient, out of the capital and subject thereto upon the same trusts as were declared by the last preceding clause concerning the balance of the residuary fund with discretionary powers for the trustees (by sub-cl. (c) and (d)) to release surplus income and capital so as to make them available for the purposes of the last preceding clause, and with a further power for the trustees (by sub-cl. (e)) to apply any moneys comprised

in the annuity fund in purchasing from the government or any insurance company an annuity for the life of an annuitant of such amount as should appear convenient so as to exonerate the remainder of the annuity fund from payment of that annuity to the extent of the amount so purchased.

Clause 12 contained provisions as to the payment of the deferred legacies which were declared only to be payable out of any surplus remaining after the setting aside of the annuity fund or out of surplus income or capital released from the annuity fund.

The testatrix died on November 7, 1946. Her estate, after payment of debts and funeral and testamentary expenses and duties and providing for the legacies given by cll. 4 and 5 of her will, proved insufficient to constitute an annuity fund which would by its income provide for the annuities in accordance with the testatrix's directions. In these circumstances the executors made arrangements to provide for the annuities given by the will by purchasing corresponding annuities from the residuary legatees.

By a letter dated April 23, 1947, the executors' solicitors wrote to Mrs. Carter and in the same terms *mutatis mutandis* to all the other annuitants as follows: "April 23, 1947. Dear "Madam, Lilian Lady Beit, deceased. 1. The Lilian Lady Beit "Pension Trust from which you received a pension of £4 19s. 4d. "net per month payable by monthly instalments terminated upon "the death of Lilian Lady Beit on November 7, 1946. Lilian "Lady Beit, however, by her will dated December 21, 1945, has "given you, free of death duties, a legacy of £50 and an annuity "payable by monthly instalments of such a sum as after deduc- "tion of income tax at the standard rate up to a maximum of "10s. in the pound will amount to £52 12s. 0d. per annum. At "the present rate of income tax, namely, 9s., and so long as "the rate does not rise above 10s. in the pound, the annuity will "be payable by monthly instalments of £4 7s. 8d. net. 2. No "difficulty is anticipated in paying your legacy in full, but "although it is anticipated that the estate will be sufficient to "pay your annuity in full there will not (as explained below) be "sufficient funds to secure it in the way in which the will "directs and other arrangements to provide for it are necessary. "3. The object of this letter is to inform you of the benefits "given to you by Lilian Lady Beit's will and to inquire whether, "having regard to the circumstances mentioned below, you would "be prepared to agree to an arrangement under which Lilian

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“ Lady Beit’s executors should purchase from her children an annuity equal in amount to that which the will gives you, and should hold it as the only security for the annuity given to you by the will, the remainder of the estate then being distributed free from your claim. 4. The circumstances in which the above request is made are as follows.” Then it set out a summary of the effect of the will as regards pecuniary legacies and annuities, and it went on: “ Most of the annuitants were recipients of pensions from the Lilian Lady Beit Pension Trust and the will provided that in the case of each such person the first monthly instalment of his or her annuity is to be payable one month from the date of the payment of the last instalment of his or her pension.”

The letter in para. 5 set out a summary of the provisions about the annuity fund; it then referred to the gift of deferred legacies after the provisions of the annuity fund, and proceeded: “ 6. The executors have now obtained a grant of probate and for that purpose have had the assets of the estate valued. On the basis of that valuation it seems reasonably certain that (after paying estate duty at the prescribed rate, namely, 55 per cent.) the estate will be sufficient to pay the legacies and annuities in full and that in course of time there will be a surplus sufficient to pay the deferred legacies and to leave an ultimate balance for the residuary legatees. But the estate will not be sufficient to provide for the annuities in precisely the way that the will directs, namely, by setting up an annuity fund sufficient to pay them out of income; capital will have to be drawn on to pay them. In brief, though the annuities can be paid, the provisions of the will for securing them by means of an annuity fund cannot be carried out.

“ 7. In these circumstances it will be necessary to make other provisions for securing the annuities and the executors are advised that unless sufficient of the annuitants are willing to agree to the arrangement suggested in para. 3 of this letter, an application will probably have to be made to the court for directions as to what other provisions they should make. The most convenient method of providing the annuities is for the executors to purchase annuities equal to those which they have to pay under the will, and Lilian Lady Beit’s children are prepared to sell them such annuities, the security for payment being the personal covenant of Lilian Lady Beit’s children. When that has been done, the executors will use the annuities

“ so purchased to pay the annuities given by the will. The remaining funds in the estate will then be distributed and will no longer be available to the annuitants. Such an arrangement can only be carried out if sufficient annuitants agree. If agreed, this method would enable the deferred legacies to be paid at once (which could not otherwise be done) and would permit Lilian Lady Beit's children, as residuary legatees, to receive immediately the funds remaining after payment of death duties, debts and legacies; this method would also avoid the necessity of applying to the court and generally speed up the administration of the estate. It would, therefore, have great advantages from the point of view of the estate.

“ 8. From their point of view the annuitants, of whom you are one, would be accepting the personal covenant of Lilian Lady Beit's three children with the executors, as providing sufficient security for their annuities in place of their right to have provision made out of the whole assets of the estate. The annuitants would benefit incidentally by having provision made for their annuities more speedily than could otherwise be arranged.

“ 9. Actually, so far as Lilian Lady Beit's children are concerned, the position would be exactly as if the Lilian Lady Beit Pension Trust had continued in operation, because although Lilian Lady Beit, during her life, controlled the operation of the pension trust, the moneys necessary to keep that pension trust in operation were provided by the children under an agreement reached between them and their mother. You will appreciate you have, in fact, since the death of Lilian Lady Beit, received monthly payments equivalent to the monthly payments which you received under the pension trust. These monthly payments have been provided voluntarily by Lilian Lady Beit's children, because they did not wish you to suffer any hardship or inconvenience by reason of the difficulties that have arisen in connexion with the will. If you are willing to agree to the arrangement proposed in this letter will you kindly sign and return to us as early as possible the enclosed letter addressed to the executors of Lilian Lady Beit, signifying your agreement. Your signature should be witnessed as indicated thereon.

“ 10. Quite apart from the position under the will Lilian Lady Beit's children propose to augment the annuity given to you by the will so as to ensure that you actually receive the same

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"amount as you did from the Lilian Lady Beit Pension Trust, "namely, £4 19s. 4d. net each month. Yours faithfully"; and that was signed by the solicitors to the executors.

The letter enclosed for Mrs. Carter's signature was duly signed and returned by her under date April 30, 1947, and was in these terms: "April 30, 1947. To the executors of Lilian Lady Beit," care of the solicitors: "Dear Sirs, I agree to the arrangement proposed in Messrs. Coward, Chance & Co.'s letter of April 23, 1947, under which the executors will purchase from Lilian Lady Beit's children an annuity secured by the children's personal covenant corresponding to the annuity given to me by her will. I agree that the executors shall hold the annuity purchased as sole security for the payment of my annuity and distribute the remainder of the estate free from any claims by me."

Similar letters assenting to the proposal were duly signed and returned by all the other annuitants with the exception of a Mrs. Annie C. Hooff, from whom no reply was received, and one A. E. Key, who disclaimed his annuity.

Effect was given to the arrangements thus proposed by the executors and agreed to by the twenty-three assenting annuitants by means of a deed of covenant dated July 26, 1947, and made between the executors of the one part and the three children, the residuary legatees (therein called "the covenantors") of the other part. By this deed, after recitals of the death of the testatrix and the relevant provisions of her will (the names of the annuitants and the amounts of their respective annuities being set out in a schedule to the deed) and recitals that the executors were desirous of purchasing annuities of similar amounts to those payable to the annuitants under the will to the intent that they might hold the annuities so purchased as assets of the testatrix's estate for the purpose of paying the annuities given by the will; that the covenantors were willing to sell to the executors such annuities secured by such personal covenant of the covenantors as thereafter appeared for a sum of £60,904 18s. 4d. and that the executors had agreed to buy the same from the covenantors; that the executors had paid this sum to the covenantors in cash and investments as therein mentioned; that the covenantors had out of their own moneys made to certain of the annuitants payments in anticipation of their annuities under the will on the footing that such payments should, when the estate of the testatrix was sufficiently administered to commence paying the annuities under the will, be treated as payments on account of such annuities; and that Mr. Key had disclaimed his annuity for

which reason his name was omitted from the annuitants specified in the schedule thereto; the covenantors jointly and severally covenanted (by cl. 1) as follows: "that as regards each of the annuitants they and their personal representatives will during the life of the annuitant pay to the executors an annuity of such annual amount as after deduction of income tax in the manner hereinafter stated shall leave the annual amount specified opposite the name of that annuitant in the schedule hereto."

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Clause 2 contained somewhat complicated provisions as to the deduction of tax corresponding to those contained in the will in relation to the annuities payable thereunder. By cl. 3 the annuities covenanted to be paid were made payable by equal calendar monthly payments. By cl. 4 each of the annuities was to commence as from the date on which the corresponding annuity under the will was payable but any sums which the covenantors might have paid direct to the annuitants in anticipation of the annuities payable under the will were to be treated as a payment under the deed. Clause 5 contained a provision, apparently redundant in view of the form of the covenant, to the effect that the deed was to operate as a joint and separate undertaking by all and each of the covenantors. The schedule to the deed set out the names of all the annuitants, other than Mr. Key, and the net amounts of the annuities payable to them respectively under the will, Mrs. Hooff's name being included in the list notwithstanding that she had not in fact assented to and accordingly was not bound by the scheme in pursuance of which the deed was entered into.

The sum of £60,904 18s. 4d. was fixed on actuarial advice as a proper price for the executors to pay for annuities on the lives and for the amounts in question. After paying this sum and paying or providing for the deferred legacies, the executors had in hand an undistributed residue of £23,000.

By a deed of indemnity of even date with the deed of covenant, the three children covenanted to indemnify the two independent executors and the testatrix's two daughters covenanted to indemnify Sir Alfred as the other executor from liability in respect of any death duties which might be payable on the death of any of the annuitants and from any costs and expenses which might be incurred in connexion with collecting the annuities payable by the residuary legatees under the deed of covenant and applying the same in payment of the annuities payable under the will.

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As from the date of the deed of covenant, the executors duly paid the annuities payable under the will, including Mrs. Carter's annuity, out of the respective corresponding annuities payable and duly paid by the three children to the executors under the deed of covenant. Mrs. Carter died on November 18, 1947, and the Crown claimed estate duty under section 43 of the Finance Act, 1940, on the footing that the arrangement of 1947 amounted to a determination of her annuity within that section.

The executors and the testatrix's three children as residuary legatees took out this summons asking whether estate duty became payable on Mrs. Carter's death, by reason of the cesser of her annuity.

Vaisey J. held that no duty was payable.

The Crown appealed.

Gerald Upjohn K.C. and *J. H. Stamp* for the Crown. The Crown contends that the true effect of the arrangement of 1947 was to determine Mrs. Carter's annuity and a charge for estate duty on her death arose under the 'combined operation of section 2 (1) (b) and section 7 (7) of the Finance Act, 1894,² and section 43 of the Finance Act, 1940,³ to the extent to which a benefit arose by reason of the determination of the annuity. The plaintiffs on the other hand contend that the arrangement did not result in the determination of the annuity but that it merely authorized a change of investment, Mrs. Carter looking to the

² The Finance Act, 1894, s. 2 (1): "Property passing on the death of the deceased shall be deemed to include . . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest: . . .".

Section 7 (7): "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall— (a) if the interest extended to the whole income of the property, be the principal value of that property; and (b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

³ The Finance Act, 1940, s. 43 (1): "Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, . . . whether wholly or partly, and whether for value or not, after becoming an interest in possession— . . . (b) if apart from the disposition or determination the property in which the interest subsisted would have been deemed by virtue of paragraph (b) of subs. (1) of s. 2 of the said Act to be included to a particular extent in the property passing on the death, the property in which the interest subsisted shall be deemed by virtue of this section to be included to that extent in the property passing on the death."

sums paid to the executors under the deed of covenant instead of to the residue as the security for her annuity. The Crown contended that the transaction was in fact a sale of the annuities with the result that it falls within section 43 of the Act of 1940. It is submitted that the court is not entitled to look at the deed of covenant but if the court desires to do so, the Crown does not object.

Apart from the transaction that took place, each annuity was payable out of any and every part of the residuary estate: *Skinner v. Attorney-General*.⁴ That is the fundamental right of an annuitant: that was the position before the agreement of 1947 was come to. Section 43 of the Act of 1940 deals with this right. The language of section 43 (1) (b) follows closely that of section 2 (1) (b) of the Act of 1894 which deals with an interest limited to cease on death. Although the annuitants' right to be paid out of residue ceased under the agreement of 1947 by reason of what amounted to a sale, which determined the right to receive the annuity, the estate duty payable on the death of each annuitant continues by virtue of the provisions of section 43. It is only if it were held that what had happened was a change of investment that the Crown's claim would fail. If an annuity were purchased from an insurance company, that, in the view of Somerset House, would be merely an implementation of the expressed will of the testator, just as though the purchase was made in his lifetime and no duty would be charged. That is the practice but it might be argued that the position was altered by section 43 of the Act of 1940. The annuity given by the will to Mrs. Carter had determined. She could, if the children had failed to pay her annuity, under the deed of covenant have herself brought proceedings to enforce payment under their covenant, joining the executors as plaintiffs or defendants. A new annuity had been substituted for the will annuity.

The court has to consider what is the real effect of the offer made by the residuary legatees and its acceptance. It cannot be said, in reliance on any vagueness of the draftsman, that the annuities payable out of residue remained so. It is expressly stated that the residue is to be distributed. The court is asked to hold that section 43 applies and that estate duty is therefore payable.

Heyworth Talbot K.C. and *John Brunyate* for the executors.
The principle laid down in *Inland Revenue Commissioners v.*

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⁴ [1940] A.C. 350.

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Duke of Westminster,⁵ namely, that effect must be given to documents according to their true construction, applies here. It is not suggested that counsel for the Inland Revenue Commissioners resile from that principle. They accept it. The court, however, is asked to look at section 43 (1) of the Act of 1940 and the documents in the case and then to apply that principle. The whole question is whether the condition precedent is fulfilled that an interest limited to cease on death has been disposed of. The court is asked to contrast the language of section 2 (1) (b) of the Act of 1894, under which property is deemed to pass on the death, and section 43 (1) when property is not mentioned. It is not said that an interest in property is not meant but it is important that the subsection concentrates on an "interest."

[EVERSHED M.R. Later in the subsection reference is made to the property in which the interest is held.]

Taking the initial words of section 43 (1): "Where an interest "has been disposed of" could it be said that they applied to a change of investment of the entire trust fund; and is that not what has really happened here as a result of the residuary estate being replaced by the covenants of the residuary legatees?

Further, it is submitted that the fact that trustees invest part of a residuary estate in unauthorized investments does not result in the unauthorized investments not forming part of the residue. The unauthorized investments remain part of residue. All that Mrs. Carter did was to accept a personal covenant to pay her her annuity in substitution for her original security. The argument is unsound that Mrs. Carter's annuity determined, because, having been charged on the whole of the residue, as a result of the arrangements of 1947 it became charged on a different property. It could not be argued that because an annuity fund had been set up Mrs. Carter's original annuity had determined.

It is submitted first that section 43 of the Act of 1940 only applies if Mrs. Carter's annuity was disposed of or determined before her death; secondly, that the annuity was never determined but that all that happened was that the security for its payment was changed. Thirdly, that, on the true construction of the agreement which she made, Mrs. Carter never gave up her right to the annuity given to her by the will; fourthly, that there is no reason why the parties should not have entered into the agreement into which they entered and it should be given its full effect.

⁵ [1936] A.C. 1.

It is submitted that the deed of covenant is admissible in evidence as part of the transaction of 1947. It is part of the bargain between the contracting parties.

Brunyate followed. It is submitted that the use of the word "sell" is a correlative term to purchase, and frequently an annuity is spoken of as being "purchased." The letters of April 23 and 30, 1947, make the intended transaction clear.

Upjohn K.C. in reply. The substitution of a personal covenant for the residue is not a mere change of investment. For section 43 of the Act to operate it is not necessary for the annuity to have "determined," it is sufficient if it has been "disposed of." That was what was done here. The transaction is within section 43. He referred to *Secretary of State in Council of India v. Scoble*.⁶

Cur. adv. vult.

Nov. 9. The following judgments were read:—

EVERSHED M.R. I have had the advantage of reading the judgment prepared by Jenkins L.J., and as he has set out fully the material facts, I shall not state them in this judgment. The facts being as stated, the question depends on the true legal effect of the arrangement made by Mrs. Carter with the executor-trustees in the year 1947, according to the proper interpretation of the relevant documents, and in the light of other material and admissible circumstances.

We were properly reminded of the principle applicable in such cases and enunciated in *Inland Revenue Commissioners v. Duke of Westminster*,⁷ namely, that the court is not entitled to turn aside from the legal result in fact achieved because it seems complex and peculiar, or because, in its practical effect, it is in substance similar to some other and simpler arrangement which might equally have been made. On the other hand, it is no less true that the court, in arriving at its conclusion on the effect in law of what was in fact done, is not to be misled by, or to place undue emphasis upon, the particular words used in the transaction: for words which are inappropriate may obscure or even disguise the true nature of that which is, in truth, achieved.

Bearing these principles in mind, I ask myself, what was the true effect of what Mrs. Carter was invited to do by the letter

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⁶ [1903] A.C. 299.

⁷ [1936] A.C. 1.

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of April 23, 1947, and what she did by her signature on April 30 to the form of reply sent with the letter? And, first, it was suggested that if an annuitant, having such an interest as Mrs. Carter had under the testatrix's will, enters into an arrangement involving the release of all the annuitant's rights in respect of every part of residue so that the residue can be, and is, immediately distributed, then the annuitant's interest under the will must necessarily altogether determine and cease to exist. All characteristics identifying the annuity by reference to the will which gave it have disappeared. That which survives the arrangement is essentially different from that which before existed.

I am unable to accept this extreme view. True, a principal attribute of an annuity conferred by will (in the absence of some special limitation in the will) is that the annuitant has the right of recourse against every item of the residue. But an annuitant under a will, as it seems to me, may release every part of the residue and agree that some other property or right vested, or to be vested, in the trustees of the will should constitute the sole subject-matter to which recourse could thereafter be had, without in other respects affecting the annuity's continuing identity.

No doubt, if an annuitant agreed to release not only the whole of the property to which the annuitant could look for securing payment, but to release also the executors and trustees as such from all further liability, accepting in exchange the personal obligation of some individual or individuals either to the annuitant direct or to some third party on the annuitant's behalf, then the annuity, the subject-matter given by the will, would appear to have determined and ceased to exist, and would have been replaced by something other and distinct. But, in my judgment, such is not the inevitable conclusion from the fact that the residue has been released.

A test may well be found by reference to the nature of the annuitant's rights, after the arrangement made, in case of default. Mr. Upjohn contended that in the present case Mrs. Carter could sue the covenantors (the testatrix's children) direct, joining the trustees as co-plaintiffs with her or as defendants. And if Mrs. Carter's annuity given to her by the will has in truth determined and been replaced by the children's covenant made with the executor-trustees as bare trustees for Mrs. Carter, this result will presumably follow. But I do not think that the result is the

necessary consequence of what was done, and to assume it, is, I think, to beg the question.

There seems to me to be nothing contrary to principle and good sense in saying that the annuitant's remedy remained always exclusively that of calling upon the executor-trustees, in an action entitled in the trusts of the will, properly to administer their trusts, that is, to take the necessary steps to enforce the covenants in their favour. And such a conclusion postulates that Mrs. Carter's rights remain rights, in essentials, conferred by the will. Whether, in the latter event, any claim might be made for duty under section 2 of the Finance Act, 1894, apart from section 43 of the Finance Act, 1940, is a matter which we are not called on to decide. For the purposes of the present case, the claim of the Crown proceeds upon the basis that the original annuity has determined so as to give rise to a claim under the joint effect of the Act of 1940 and the Act of 1894.

If, then, an arrangement which preserves the identity of the will annuity but substitutes for the "security" provided by the testatrix's estate some other subject-matter, is one that is possible and legitimate, the question remains whether it has been achieved. Certainly the language of the relevant letters seems clearly and deliberately upon the face of them directed to that end. In para. 3 of the letter of April 23 Mrs. Carter is invited to agree to an arrangement under which the executors have purchased a certain annuity to hold it as the only security "for the annuity given to you by the will," language in terms postulating the continuance of that annuity and not its replacement by something else. Again, in the seventh paragraph, the language follows the same intent: "The most convenient method of providing the annuities" (that is, the annuities given by the will) "is for the executors to purchase annuities . . . the security for payment" (that is, of the annuities given by the will) "being the personal covenant. . . . The executors will use the annuities so purchased to pay the annuities given by the will." The eighth paragraph is again to the same effect. In no part of the letter does the language used, according to its ordinary plain meaning, state or suggest that the annuities given by the will as such determine or are replaced. The form of reply has been no less carefully drafted. "I agree," says Mrs. Carter, "that the executors shall hold the annuity purchased as sole security for the payment of my annuity and distribute the remainder of the estate free from any claims by me."

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Mr. Upjohn argued that the deed in fact entered into with the children was, in strictness, not admissible; but he said also that the Crown did not desire that the court should not see it in case any assistance could be derived from its terms. As regards its admissibility, I should have thought that the court was entitled to pay regard to it as part of the transaction in fact entered into and therefore as throwing light upon the true nature of the arrangement which Mrs. Carter was asked to make or approve. The two letters constituting the "bargain" (whether enforceable or not) between Mrs. Carter and the executor-trustees did not specify exactly the arrangement to be made—Mrs. Carter's acceptance merely authorizing "an arrangement" of a character designed to achieve a particular end. If, then, on reference to the deed, it had appeared that the "arrangement" in fact entered into necessarily had the effect of putting an end to Mrs. Carter's annuity, it would (I should have thought) have properly been referred to by the Crown as casting light upon the true nature of what was contemplated, notwithstanding the actual words used in the letters—and whether, in such event, Mrs. Carter could have said that the deed went beyond her authority, is a point which need not be considered. In fact, however, and I think beyond a doubt, the deed by its language strictly conformed to the interpretation which I have placed on the terms of the letters which forecast the nature of the transaction into which the executor-trustees proposed to enter. Without placing undue emphasis on the recitals, it is sufficient to say that the terms of the deed support and confirm the contention of the plaintiffs that the arrangement into which she was invited to enter, and which was, in fact, made, was one deliberately designed and properly expressed so as to achieve the perpetuation of the annuity given by the will.

I was, during the course of the argument, somewhat troubled by the language used in the seventh paragraph of the letter, where it is stated that "Lady Beit's children are prepared to sell 'them such annuities.'" If I may borrow the language of Lord Simonds, used in a very different context in his speech in the House of Lords in *St. Aubyn v. Attorney-General*⁸: "No one, lawyer, business man, or man in the street, was ever 'heard to use such language to describe such an act.'" And the phrase and the notion behind it was still to my mind more startling when the so-called purchase price consisted of sums of

⁸ [1952] A.C. 15, 32.

residue to which the alleged sellers were in any case entitled subject to the annuities. I was tempted to wonder whether the language used in this respect indicated a degree of artificiality great enough to throw doubt on the genuineness of the whole transaction. But I have resisted the temptation. Mr. Brunyate said that the language was not so strange in truth as I had myself thought: and, in any case, the import of the particular words is not essential to the achievement of the main purpose of the arrangement.

I have therefore come to the same conclusion as that reached by Vaisey J. In the course of his judgment the judge used this language: "Indeed it may well be, and I think it is, the case that the situation is irresolvably ambiguous in character. These are some of the questions which were suggested, or have occurred to me. Was Mrs. Carter, immediately prior to her death, receiving from the trustees of the will of the testatrix the annuity bequeathed to her by that will, or was she in receipt from the executors, parties to the deed of 1947, of a substituted annuity of the same amount held by them for her not as trustees of the will, but as bare trustees under the terms of the arrangement? Ought the purchase by the executors of the annuities from the children to be considered as an investment (unauthorized but agreed to) of a portion of the testatrix's estate, to be held by them thereafter as trustees of the will? Or ought the arrangement to be regarded as the setting up of a new series of trusts superseding the original trusts of the will? It is to be observed that the deed of 1947 makes no mention at all of the trusts of the will or of the continuing obligations of the parties of the former part (defined as 'the executors') in their capacity of trustees of the will, which raises this further question, whether the appointment of new trustees of the will with a vesting declaration in common form would give to the appointees the right to sue the children under the deed of 1947? Or would it be necessary, and not merely a wise precaution, to extend the appointment and declaration so as to cover expressly the deed of 1947?"

I have found the point in the case difficult and narrow, as did the judge. On the other hand, there is no ambiguity in the language of the statute. The ambiguity, that is, the doubt and difficulty, arise from the nature of the transaction in question and the language used in the material letters. That being so, it

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seems to me that the court is bound, to the best of its ability, to resolve the difficulty and to reach a decision on the question, what was in truth the effect of the arrangement made: and then to say whether the Crown is entitled to bring the case within the terms of section 43 of the Act of 1940. And this task I have attempted to perform. In the first two alternative questions posed by the judge in the passage I have quoted lies the kernel of the matter. Those are the questions which I think the court is bound to answer, and my answer is in accordance with the first of the two alternatives. Similarly, I would answer the judge's third question affirmatively and his fourth negatively. As regards the antinomy contained in the last two questions posed by the judge, I am not for myself entirely satisfied that the premise on which the questions are based is well founded: nor am I satisfied that for the purposes in hand it is necessary to answer the two questions posed one way or the other. Since the particular questions may arise in fact hereafter in reference to other annuities, I prefer not to attempt any answer to either question now, but to allow them to await the time when they may actually arise for decision.

In my judgment the appeal should be dismissed.

JENKINS L.J. This appeal concerns a claim for estate duty on the death of Mrs. Estelle Newton Carter, who died on November 18, 1947, in respect of an annuity given to her by the will dated November 21, 1945, and proved on February 26, 1947, of Dame Lilian Beit, who died on November 7, 1946.

The claim is founded upon the contention that Mrs. Carter's annuity was an interest limited to cease on her death which had been disposed of or had determined within the meaning of section 43 of the Finance Act, 1940, with the result that as Mrs. Carter failed to survive the date of such disposition or determination by the minimum period prescribed as a condition of exemption from the operation of that section, estate duty became payable by the joint effect of section 2 (1) (b) of the Finance Act, 1894, and section 43 of the Finance Act, 1940, on the "slice" of the testatrix's residuary estate required to produce the annuity, ascertained in accordance with the provisions of section 7 (7) of the former Act.

In proceedings brought by originating summons by the testatrix's executors and residuary legatees as plaintiffs against

the Inland Revenue Commissioners as defendants Vaisey J.,⁹ by his judgment dated June 6, 1951, rejected the claim and the commissioners now appeal from that decision.

[His Lordship stated the facts and continued]: The question for decision is whether the mode of providing Mrs. Carter's annuity proposed by the letter of April 23, 1947, agreed to by her by the letter of April 30, 1947, and implemented by the deed of covenant, involved a disposition or determination of the annuity payable to her under the will within the meaning of section 43 of the Finance Act, 1940. If it did, then by virtue of that section, in conjunction with section 2 (1) (b) of the Finance Act, 1894, this transaction must be wholly ignored and duty must be paid on the appropriate "slice" of residue ascertained in accordance with section 7 (7) of the latter Act, as if the letters of April 23 and April 30 had never been written and the deed of covenant had never been executed. This result would involve considerable, though probably not insuperable, difficulties of calculation under section 7 (7), in view of the extent to which the residuary estate has in fact been expended or distributed. If, on the other hand, section 43 has no application, it is admitted on the part of the commissioners that duty cannot be exigible by the unaided operation of section 2 (1) (b), inasmuch as the annuity payable to Mrs. Carter under the will (hereinafter referred to as "the will annuity"), which, on this view of the matter, continued on foot down to the date of her death, was at the date of her death an interest subsisting only and exclusively in property consisting of the corresponding annuity payable to the executors under the deed of covenant (hereinafter referred to as "the covenanted annuity") which ceased contemporaneously with the will annuity, so that no benefit, or no benefit capable of valuation under the provisions of section 7 (7), accrued or arose by the cesser of the will annuity.

It is clear that the answer to this question must depend primarily on the true construction and legal effect of the scheme embodied in the letters of April 23 and 30, 1947. The deed of covenant is material and relevant only in so far as it shows that the scheme agreed to by Mrs. Carter was in fact carried out, for she was no party to it and therefore could not have been bound by any of its provisions which might not precisely accord with the terms of the scheme to which she had agreed.

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Mr. Upjohn, for the commissioners, assented (and rightly, in view of *Inland Revenue Commissioners v. Duke of Westminster*¹⁰) to the proposition that any liability to duty in the present case must be established by reference to the true legal effect of the transaction in the form it actually took, and not by a process of equating the transaction as actually carried out to some other transaction of different legal effect by means of which a substantially similar result would for all practical purposes have been achieved, and which, if it had been the transaction actually carried out in the present case, would have attracted duty as claimed.

He submitted, however, that the transaction as actually carried out and judged according to its true legal effect was indeed such as to entitle the commissioners to succeed.

If I might briefly summarize his argument, he claimed the true legal effect of the letters of April 23 and 30, 1947, to be that Mrs. Carter gave up the whole of her interest in the residuary estate in exchange for an annuity payable by the residuary legatees to the executors as bare trustees for her, and not in their capacity as executors or trustees of the will. He pointed out that it was a matter of indifference to Mrs. Carter what, if anything, the executors might pay out of residue in order to obtain the covenant. All that mattered to her was that the covenant should be obtained. He also relied on the fact that the terms of the arrangement were such that Mrs. Carter was to look exclusively to the corresponding covenanted annuity for payment of her will annuity, and that neither she nor any of the other annuitants had any interest in any of the covenanted annuities other than the one corresponding to his or her will annuity. From this he adduced that Mrs. Carter could at any time after the execution of the deed of covenant have called upon the executors to assign to her absolutely the covenanted annuity corresponding to her will annuity, when she would have been left with nothing but a purely contractual annuity payable direct to her by the residuary legatees, her will annuity and the interest in residue which it originally conferred being clean gone. He argued further, that if the executors had made default in paying Mrs. Carter's will annuity through some failure on the part of the residuary legatees to pay the corresponding covenanted annuity, her proper remedy would have been to sue the residuary legatees in the name of the executors, or failing that, to sue the residuary legatees joining

¹⁰ [1936] A.C. 1.

the executors as defendants. He relied on the fact that the executors could have no right to deduct from the annuity paid to Mrs. Carter under the scheme anything in respect of costs, charges and expenses, as supporting his submission that there was here no true retention of residue to meet Mrs. Carter's will annuity, but rather a substitution for the will annuity of a new and wholly contractual interest in the shape of the covenanted annuity.

Mr. Upjohn therefore invited us to hold that the actual transaction, judged according to its true legal effect, did involve a disposition or determination of Mrs. Carter's will annuity.

But, with all respect to his clear and persuasive argument, it appears to me on examination to stand convicted of the error reprobated in the *Duke of Westminster's* case.¹¹ Turning again to the letters of April 23 and 30, 1947, I find the proposal actually made and accepted to be not that Mrs. Carter's will annuity should be surrendered in exchange for a contractual annuity payable by the residuary legatees, but that Mrs. Carter's will annuity should be provided for out of the residuary estate in a particular way, that is to say, by the purchase by the executors out of the residuary estate of an annuity of corresponding amount from the residuary legatees, such annuity to be secured by the personal covenant of the residuary legatees with the executors, and to be used by the executors to pay Mrs. Carter's will annuity; Mrs. Carter on her part agreeing that the executors should hold the annuity so purchased as sole security for her will annuity, and should distribute the remainder of the estate free from any claims by her.

It seems to me reasonably plain that if the arrangement thus summarized was capable of taking legal effect according to its terms its legal effect was: (i) that Mrs. Carter's will annuity was not disposed of or determined but remained on foot; (ii) that, with Mrs. Carter's consent, a part of the residuary estate invested in a particular way, that is, in the purchase by the executors from the residuary legatees of the corresponding covenanted annuity, was appropriated as the sole security for payment of her will annuity in exoneration of the remainder of the estate; (iii) that no contractual relationship whatever was set up between Mrs. Carter and the residuary legatees, the obligation undertaken by the latter being exclusively an obligation to the executors to pay them the several covenanted annuities; and (iv) that Mrs. Carter's rights in respect of her annuity continued

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to be those of an annuitant under the testatrix's will against the executors and trustees of that will, modified only to the extent that a particular asset of the residuary estate, in the shape of the corresponding covenanted annuity, had, with her consent, been appropriated, in exoneration of the remainder of the estate, to the payment of her will annuity.

I see no reason for holding that the true legal effect of the arrangement was not exactly as above described. No doubt for all practical purposes a substantially similar result might have been achieved more simply and directly, if Mrs. Carter had surrendered her will annuity in exchange for a covenant with her by the residuary legatees for the payment to her of an annuity of like amount; and if the transaction had taken that form, duty would presumably have been attracted on her death under section 43 of the Finance Act, 1940. But the transaction did not take that form, and there is, in my view, no justification for treating it for duty purposes as if it had.

The circumstance that the particular asset appropriated to meet Mrs. Carter's will annuity consisted solely of a contractual annuity of like amount and duration purchased by the executors out of the residuary estate for this express purpose, does no doubt lend to the scheme a certain air of artificiality, which is increased by the further circumstance that the vendors of the contractual annuity to the executors were themselves the residuary legatees. But these circumstances afford no justification for disregarding the true legal effect of the transaction. They are relevant only in so far as they can properly be regarded as determining or qualifying its true legal effect. I cannot see that they can be properly so regarded. If the transaction as formulated and carried out had been in all respects precisely the same, save that the covenanted annuity was purchased from an insurance company instead of being purchased from the residuary legatees, would it have had a different legal effect in relation to the question whether Mrs. Carter's will annuity had been disposed of or had determined within the meaning of section 43 of the Finance Act, 1940? In my view, its legal effect would in all essentials have been the same. The position would still have been that the executors, with the consent of Mrs. Carter, would have appropriated a particular asset (namely, a contractual annuity of like amount and duration purchased out of the residuary estate) to answer Mrs. Carter's will annuity in exoneration of the remainder of the residuary estate. How could it then have been contended

with any colour of justification that Mrs. Carter's will annuity had been disposed of or had determined? So to contend would, so far as I can see, have been a flat contradiction both of the facts (it being assumed that Mrs. Carter's will annuity had been duly paid in full down to the date of her death) and of the true legal position. What bearing can the circumstance that the persons by whose covenant the contractual annuity was secured were themselves the residuary legatees have on the result? In my view none. It can do no more than aid the obnoxious argument, based on the so-called "substance" of the transaction, to the effect that in substance the transaction was a release of the entire residue to the residuary legatees discharged from Mrs. Carter's annuity in consideration of their personal covenant to pay her a like annuity in lieu thereof. But in law how did the matter actually stand? The residue was unadministered. The residuary legatees could not claim a penny in their capacity as beneficiaries until the annuities had been fully provided for, the deferred legacies paid or provided for, and the ultimate residue thus cleared for distribution. There is, therefore, so far as I can see, no justification for holding that as a matter of law the payment made to them out of the unadministered residuary estate as the purchase price of the covenanted annuities did not bear the character it purported to bear according to the terms of the transaction as actually carried out, but must be treated as a payment to them on account of their beneficial interests in the ultimate residue. Accordingly, I cannot regard the circumstance that the residuary legatees were themselves the vendors to the executors of the covenanted annuities as having any true bearing on the result.

As to the character of the asset appropriated to answer Mrs. Carter's will annuity, if in fact it was an investment of part of the residuary estate (as, in my view, it clearly was) I fail to see how the legal result of the transaction is affected by the circumstance that the asset so appropriated consisted of a contractual annuity of like amount and duration. If instead of purchasing such an annuity, the executors had acted as their own insurers and, with Mrs. Carter's consent, had appropriated to answer her will annuity a part of the residuary estate calculated to be sufficient by expenditure of both capital and income to pay her will annuity in full down to the date of her death, and, in the event, their calculation had turned out to be exact, so that the appropriated fund had been exhausted by the payment of the final instalment, I apprehend it could not be maintained that Mrs. Carter's will annuity

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had been disposed of or had determined in her lifetime. The relevant question seems to me to be whether the executors provided for the payment of Mrs. Carter's annuity by means of an investment made out of residue. The answer to that question being "Yes," it seems to me immaterial that the investment they chose to make for this purpose (admittedly in breach of trust, but with the consent of the interested parties) consisted of a contractual annuity of like amount and duration.

Mr. Upjohn's submissions as to the form any action by Mrs. Carter would properly have taken in the event of default by the executors or by the residuary legatees as covenantors, and as to Mrs. Carter's right to call for an assignment of the covenanted annuity do not, I think, carry the matter any further. The question must still be whether Mrs. Carter's rights under the scheme were those of a beneficiary entitled to an annuity under the will with whose concurrence an appropriation of a particular asset representing part of the estate had pursuant to the scheme been made to answer that same annuity, or were those of a former annuitant under the will, who had given up that annuity in exchange for a new and distinct annuity payable to her by virtue of the scheme. The first of these alternatives represents what appears to me to be the correct view, and, if it does, I do not see how discussion of the appropriate procedure for the enforcement of her rights under the will, in view of the character of the particular asset appropriated, can be of any real assistance. As to Mrs. Carter's alleged right to call for an assignment of the covenanted annuity, while I am quite prepared for the sake of argument to accept its existence, I cannot see that it amounts to any more than a corollary to the appropriation of a particular asset for the exclusive purpose of answering her will annuity, or that it in any way advances the contention that her will annuity had been disposed of or had determined within the meaning of section 43 of the Finance Act, 1940. She never did call for or obtain any such assignment, and I see no merit in speculating as to what the position might have been had she in fact done so. As to the freedom of the fund represented by the covenanted annuity from any claim on the part of the executors for costs, charges and expenses, I do not see how this advances the argument that the provision made by it for the payment of Mrs. Carter's will annuity was in truth a provision for the payment to her of a different annuity otherwise than out of the residuary estate.

A subsidiary argument advanced by the Crown was to the effect that inasmuch as section 43 of the Finance Act, 1940, is concerned with interests in property, and an annuity given by will is an interest in the residuary estate and every part of it, therefore, where an annuitant consents to the appropriation of a particular part of residue to answer the annuity in exoneration of the remainder, the annuity is disposed of or determined within the meaning of the section quoad the part of the residuary estate so released. I cannot follow this argument. An annuitant is entitled to receive no more and no less than the prescribed annual sum. So long as it continues to be payable, and is paid in full, out of some part of the residuary estate sufficing for the purpose, it has not according to any ordinary use of language been disposed of or determined merely because the annuitant has agreed to look exclusively to that part of the estate as adequately securing the due payment to him of the full annual amount to which he is entitled.

For the reasons I have endeavoured to state, although I am far from regarding the case as free from difficulty, I have reached perhaps rather more positively the same conclusion as the learned judge, and am accordingly of opinion that this appeal fails and should be dismissed.

MORRIS L.J. In my judgment the problem that is presented in this case is one calling for the construction of the two letters of April 23 and 30, 1947. Before she received the former letter Mrs. Carter had all the rights to which as an annuitant under the will she was entitled. When she had dispatched her letter of April 30 were her former rights modified and, if so, in what way and to what extent, or were they replaced by or exchanged for some other rights? In my judgment these are the issues which arise.

I can see no reason for endowing the words of the two letters with any meanings or implications other than the ordinary and natural ones. There is no suggestion that there was any other communication of any kind sent to Mrs. Carter than the letter of April 23. When, from Texas, she sent her written reply, it is to be read and judged according to normal rules of interpretation. I do not understand the Crown to contend otherwise. Indeed, Mr. Upjohn repudiated any quest for the "substance" of the matter but invited examination of it "in truth and in fact."

Mrs. Carter agreed to the proposals contained in the letter of April 23. She agreed that the annuity to be purchased by the

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executors would be held by them as the sole security for the payment of her annuity. She further agreed that the executors could distribute the remainder of the estate free from any claims by her.

Different proposals might have been made to Mrs. Carter. She might have been invited to accept the direct obligation of the testatrix's children as covenantors to her. She was not so invited and she did not so agree. She agreed: (1) that the executors should expend money in purchasing a covenant from the testatrix's children that they would pay to the executors the annual sum of £52 10s. 0d. during her own life, and (2) that the executors would hold such purchased annuity "as sole security for the payment" of her annuity. Mrs. Carter did not give up her right to receive her annuity under the will. She expressly referred to it in manner consistent only with retention of it. Her words "sole security for the payment of my annuity" clearly refers to her annuity under the will. Her words in the first sentence of her letter confirm this, that is the words "the annuity given to me by her will."

She agreed to a change in the security which was the buttress supporting the obligation of the executors to pay to her her annuity under the will. We were invited by the Crown to treat the matter as though in place of the phrase "as sole security," some alternative phrase were found. I can see no reason at all for yielding to an invitation to say that Mrs. Carter used one phrase but meant another. The word "security" seems to me to be part of the core of the matter. She had been invited in the letter of April 23 to consider the "security" aspect. In para. 6 of that letter she was told: "In brief though the annuities can be paid, the provisions of the will for securing them by means of an annuity fund cannot be carried out." In para. 8 of the letter she was told: "From their point of view the annuitants, of whom you are one, would be accepting the personal covenant of Lilian Lady Beit's three children, with the executors, as providing sufficient security for their annuities in place of their right to have provision made out of the whole assets of the estate."

It is in the light of these passages that the word "security" in Mrs. Carter's reply of April 30 must be regarded. She agreed to an alteration in the character of the support upon the basis of which the executors could discharge their obligation to pay to her her annuity under the will. She did not use any words which vary or modify her right to her annuity, save that she agreed that the executors might so deal with the estate that it would be denuded

of assets, but that there would be a future inflow to the executors which would put them in a position to discharge their obligation under the will of paying to her her annuity. Being satisfied that the source of the inflow to the executors would be constant and dependable, she was satisfied that there was security for the payments due to her. In saying to the executors: "You may take an annuity so that you may pay me my annuity" she was not merging the two annuities. She was not ending her right to her annuity under the will, but, in expressly referring to it, she was facilitating certain arrangements by which its payment to her by the executors would be ensured.

The executors entered into the deed of covenant with the covenantors on July 26, 1947. The Crown, who maintained that after that date the executors were bare trustees for Mrs. Carter of the right given by the deed to receive an annuity during Mrs. Carter's life, also maintained that in strictness the court was not entitled to look at the deed, because Mrs. Carter was neither party nor privy to it. The Crown did not, however, press an objection to the perusal by the court of the deed but submitted that, if the deed were looked at, it would be found to contain a misrecital. In my judgment, the court is entitled to look at the deed. Its existence forms one of the events which the court is invited to survey. It is, I consider, further useful to look at the deed in order to see whether it embodied the transaction which was to be expected if other annuitants decided similarly to Mrs. Carter. A perusal of the deed shows it to be in the form which, after reading the two letters of April 23 and 30, I would have expected to find. In particular, I consider that it was accurate to have recited in the following terms: "And whereas the executors are desirous of purchasing annuities of similar amounts to those payable to the annuitants under the will to the intent that they may hold the annuities so purchased as assets of the testatrix's estate for the purpose of paying the annuities given by the will."

In the result, I have come to the conclusion that Mrs. Carter's right to receive an annuity under the will was one that continued until her death, that she did not dispose of that right or acquire any new or substituted right, and that her right was not determined. Accordingly, section 43 of the Finance Act, 1940, did not come into operation and I would answer the question raised in para. 1 of the originating summons in the negative.

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I am therefore of opinion that this appeal should be dismissed.

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B. A. B.

HARMAN J.

*In re GARE, DECEASED.*FILMER AND ANOTHER *v.* CARTER AND OTHERS.

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[1951 G. 543]

Will — Construction — Printed form — Residuary bequest “equally between St. Peter’s Church, Staines, and Oxford University” — Second devise and bequest of residue “not hereby otherwise disposed of” to executors “to deal with at their discretion” — No inconsistency — First residuary bequest valid.

A testator used a printed form of will, kept the printed words and, after the words “I bequeath the following legacies,” gave pecuniary legacies in his own writing and gave also five-sixths of his capital in his firm to his partner and one-sixth of it to his employees. Next he wrote: “The residue of my estate to be divided equally between St. Peter’s Church, Staines, and Oxford University”

The last printed part of the will was “I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto . . .” and the testator added in his own writing “my executors to deal with at their discretion.”

Held, (1) that the two gifts were not inconsistent. The first, if effective, carried the whole of the residuary estate and there was then nothing on which the second could operate, while if the first gift failed or failed to some extent, the second gift would then serve a useful purpose; (2) that the first gift was effective, for the validity of the gift of half the residuary estate to Oxford University was not challenged and the gift of half the residuary estate to St. Peter’s Church, Staines, was a good charitable gift intended to be devoted to church purposes and that the Parochial Church Council was the proper body to deal with it, but could use it only for church purposes and not for parochial purposes, which might be other than religious; citation by Lord Hardwicke L.C. in *Cheeseman v. Partridge* (1739) 1 Atk. 436, 437, of “the old case of a gift to the Parish Church of St. Andrew, Holborn,” considered.

Per curiam. Double gifts of residue in a will are not irreconcilable so as to bring into operation the rule that the second must prevail over the first, for the second is to be construed as intended to operate on lapsed legacies or shares of residue: *Hardwicke (Earl of) v. Douglas* (1840) 7 Cl. & Fin. 795 distinguished.

In re Spencer (1886) 54 L.T. 597 is not authority for the statement in Theobald on Wills (10th ed.) p. 532 for which it is cited, namely, that "where the testator using a printed form of will made "two residuary gifts it was held that the first, which was in his "writing prevailed," and that statement is not correct.

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A testator by his will dated November 14, 1940, and consisting of a printed form which he bought and filled in, followed the printed words and, after the words "I bequeath the following "legacies," gave, in his own writing, certain pecuniary legacies, gave to his partner five-sixths and to his employees one-sixth of his capital in the firm in which he was interested and then wrote: "The residue of my estate to be divided equally between St. Peter's Church, Staines, and Oxford University. My executors "may postpone realization of any assets until necessary for the "final distribution of the estate."

The ultimate printed portion of the will was "I devise and "bequeath all my real and personal estate not hereby otherwise "disposed of unto" To that the testator added in his own writing "my executors to deal with at their discretion."

On March 31, 1950, the testator died and on February 28, 1951, the executors took out this summons for the decision of the questions and granting of the relief following: (1) whether the residuary estate was directed to be divided between St. Peter's Church, Staines, and Oxford University, or was given to the executors to be dealt with at their discretion; (2) if it was directed to be divided between the church and the university, whether the gift to the church was valid and if so who was or were the proper person or persons to give the executors a good receipt for it; (3) if and so far as necessary a scheme for the administration of the whole or any part of the residuary estate.

R. W. Goff for the executors. Clearly, both of these gifts cannot be effective, for it is impossible for "the residue" of the estate "to be divided equally between" the church and the university and for "all" the testator's "real and personal estate "not hereby otherwise disposed of" to go to his executors. He must have meant one or the other; and the accepted rule points to the devise and bequest to the executors as being effective, as

HARMAN J. it is the latter of these two inconsistent dispositions. The note in Theobald on Wills (10th ed.), at p. 532, states that "where 1951
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"the testator using a printed form of will made two residuary
 "gifts it was held that the first, which was in his writing, pre-
 "vailed," and that is stated to be the effect of the decision in
In re Spencer.¹ Here, the words of each residuary gift are in
 writing.

M. J. Albery for the vicar of St. Peter's Church, Staines, the Parochial Church Council of the parish of St. Peter's Staines, and the chancellor, masters and scholars of the University of Oxford. This is not a gift to the executors, but a gift to St. Peter's Church, Staines, and to Oxford University. There is no inconsistency. The first gift, to the church and to the university, is effective: and there is nothing left for the executors "to deal with at their discretion." It has not been the practice to treat two residuary bequests of this kind as inconsistent, for the second one can be, and has been, properly construed as intended to include any legacies or shares of residue that lapse: *In re Isaac*.² True, in *Hardwicke (Earl of) v. Douglas*³ it was held that a codicil containing a second residuary gift revoked the gift of residue in the will; but it is to be observed that Lord Cottenham L.C. dissented from that. In the present case, the second residuary bequest is in the will itself and certainly does not prevail over the first one. Were there anything to which the second residuary bequest could apply, it would apply to it; but there is not, so that bequest must be inoperative.

The gift to the church is a valid charitable gift. Although to the church nominatim it is really a gift to the parochial church council: see *Cheeseman v. Partridge*,⁴ in which Lord Hardwicke L.C. referred to "the old case of a gift to the Parish Church of St. Andrew, Holborn, which was construed to be a gift to the parson and parishioners of St. Andrew, and their successors forever." That was a charitable gift, and so is the gift in the present case, and the proper person to receive it and to administer it is the corporate body which is the parochial church council.

The gift to the university is good beyond any doubt.

Harold Lightman for the next of kin. Should the court decide that the second gift prevails, and that the residuary estate goes to the executors, they are of course free, under the words "to deal with at their discretion," to give nothing whatever to the next of kin. If, however, the second gift is inoperative and

¹ (1886) 54 L.T. 597.

² [1905] 1 Ch. 427.

³ (1840) 7 Cl. & Fin. 795.

⁴ (1739) 1 Atk. 436, 437.

there is any failure under the first gift, the next of kin will benefit accordingly. It is quite arguable that there is a failure; for prima facie there is no one who can give a good receipt for the gift. The vicar cannot; there is nothing to indicate that the parochial church council is the proper body to do so; and quite clearly the church itself cannot. Accordingly, the gift fails and, as the second residuary bequest is inoperative, the first residuary bequest, as to one-half thereof, goes under intestacy to the next of kin.

Denys Buckley for the Attorney-General. As always, the court will incline against failure and give effect to this gift as charitable if it can. Clearly, "St. Peter's Church, Staines," was just as much an entity to the testator as was "Oxford University." He did not intend the expression to be devoid of meaning and therefore ineffective. The court can hold that the gift to the church is a gift to a legatee and is therefore for a charitable purpose, namely, for the work of St. Peter's Church, Staines: *In re Bain*⁵; *In re Eastes*.⁶ It is not for secular purposes and must not be used for them. That is clear from the terms of the gift. The argument of counsel for the vicar and the parochial church council is adopted on behalf of the Attorney-General.

HARMAN J. [having stated the facts]. The first question which arises on this home-made will is whether what might loosely be called the first or second of the two apparent residuary bequests contained in it should prevail.

It has been contended that this is a case to which the rule that the latter of two inconsistent phrases, bequests or devises in a will must be preferred to the former applies. No doubt that rule exists. It is, however, like a similar but converse rule applying to deeds, only a counsel of despair, and will be resorted to by the court only where there is absolute inconsistency from which there is no way out. Where two phrases, bequests or devises cannot be reconciled, the court will naturally follow that rule to give effect to the whole document.

There is not any great difficulty in this case. The testator gave the residue of his estate to two corporate beneficiaries. Then, finding in the will form a line about "estate not hereby otherwise disposed of," he said to himself "my executors are to have that." The court has only to ask what it is that is "not

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⁵ [1930] 1 Ch. 224.⁶ [1948] Ch. 257.

HARMAN J. "hereby otherwise disposed of." If the first gift be good, nothing is "not . . . otherwise disposed of," and there remains nothing on which the ultimate gift can operate. On the other hand, should the gift to St. Peter's Church and Oxford University fail for some reason, or to some extent, no doubt the ultimate gift would serve a useful purpose. In my judgment I am not confronted with an inconsistency.

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I do not subscribe to the view expressed in *Theobald on Wills* (10th ed.), at p. 532, that "where the testator, using a printed form of will, made two residuary gifts, it was held that the first, which was in his writing, prevailed." In my view, *In re Spencer*,⁷ which was cited in support of that proposition, is no support at all. True, counsel argued the matter on that footing, but Bacon V.-C. said nothing about it in his judgment, and it would not be right to suppose that in these forms one must disregard printed gifts and regard only the manuscript. But, however that may be, it has been pointed out to me—as far as I know correctly—that the doctrine about irreconcilability has not been applied to cases of apparently double gifts of residue, the reason being, I think, that which has been given in several of the cases, namely, that the second gift was meant to sweep up lapsed legacies, or shares of residue.

In *In re Isaac*⁸ there was argument on the footing that lapsed legacies fell into the second rather than into the first residue, and Buckley J., having found that the first residue was the residuary gift, also held that the lapsed legacies fell into the first residue. In the case of *Hardwicke (Earl of) v. Douglas*,⁹ where the second residuary gift was in a codicil, the decision of the majority of the House was that the codicil revoked the will, a conclusion which was easily understandable because that is, as a rule, the view on a codicil. Even so, however, Lord Cottenham L.C., who gave a dissenting judgment, would not hold that revocation to be effective. However that may be, two bequests appearing respectively in a will and codicil are quite different from those which appear one after the other in the will, as in this case, and I have no hesitation in holding that the first gift, so far as effective, carried the whole of the estate, and that the second gift to the executors had therefore no operation.

The second question for decision is whether the first gift is good in so far as half of it goes to St. Peter's Church, Staines. In my judgment it is a good charitable gift. It is a gift for a

⁷ 54 L.T. 597.

⁹ 7 Cl. & Fin. 795.

⁸ [1905] 1 Ch. 427.

religious purpose. The argument chiefly turned on whose was the proper hand to receive it. I have not found any authority about a gift to a church later than a reference in *Cheeseman v. Partridge*¹⁰ to what is there called an "old case." Lord Hardwicke L.C. said: "Now I am of opinion that this was intended "by the testator as a perpetuity, for he did not give it to a "particular schoolmaster, but to the school itself, which is like "the old case of a gift to the Parish Church of St. Andrew, "Holborn, which was construed to be a gift to the parson and "parishioners of St. Andrew, and their successors forever." I think that by that observation he meant that it was a charitable gift for the purpose of the parson and parishioners.

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The gift in the present case is to a church. Is it a gift to the parochial church council, a corporate body appointed by the Parochial Church Councils Measure, 1921, or to the parson and the churchwardens, or not to any named person but intended to be devoted to church purposes? In my judgment the last description is correct. It is a gift intended to be devoted to church purposes in the parish of St. Peter's, Staines, and no doubt the proper body to direct those activities will be the parochial church council.

In my judgment they are limited, in the use they make of the money, to church purposes, that is to say, purposes connected with the services of the church, and may not allow it to be extended to parochial purposes, which might be other than religious in their nature. Unless the Attorney-General and the solicitors for the church council can come to an arrangement before the order is drawn up, there must be a scheme for the administration of the fund; but I hope that they will be able to do so. The fund should be vested in the parochial church council and held by them on an appropriate trust, which should be suitably recorded. A difficulty about that may arise by reason of the Parochial Church Councils Measure, 1921, but that I have not at this stage to decide. If there are difficulties of that sort, then there must be a scheme and that must be resolved in chambers.

The other half of the gift, to the corporate body of the University of Oxford, will go to that body and they will give a good receipt for it without any peradventure.

Accordingly, I will declare, in answer to question 1, that the testator's residuary real and personal estate is directed to be

¹⁰ 1 Atk. 436, 437.

HARMAN J. divided between St. Peter's Church, Staines, and Oxford University; and to question 2, that the gift to St. Peter's Church, Staines, is valid. I will direct that, unless there is some agreement before the order is drawn up, the fund be administered in accordance with a scheme, to be brought into chambers by the parochial church council. The costs of all parties as between solicitor and client will be paid out of the estate in due course of administration.

Declarations accordingly.

Solicitors: *Wake, Wild & Boulton; R. H. Behrend, Kendall, Price & Francis; Treasury Solicitor.*

K. R. A. H.

HARMAN J. *In re* FITZPATRICK. BENNETT *v.* BENNETT.

1951
Oct. 24, 25.

[1950 F. No. 2355.]

Administration—Specific legacy of chattels—Death of testatrix resident abroad—Chattels situate abroad—Legatee in England—Cost of conveying and insuring during transit to England.

Where executors assent to a specific legacy of chattels situate abroad, the cost of conveying and insuring them during transit to England must be borne by the specific legatee. *In re Scott* [1915] 1 Ch. 592 followed; *In re Hewett* [1920] W.N. 366; 90 L.J.Ch. 126, not followed.

ADJOURNED SUMMONS.

The testatrix, who was domiciled in England, resided for several years before her death in 1944 at Monte Carlo. By a codicil to her will, dated July 10, 1943, she bequeathed to her sister, N. H. Bennett, "all my possessions in the principality "of Monaco," which consisted of cash in the bank, household goods, jewellery and furniture.

Both her will and codicil were proved in England, and after her death two of her executors went to Monaco, possessed themselves of the testatrix's chattels there, and arranged for them to be shipped back and delivered to the specific legatee in this

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

country. The costs of shipment and insurance of the chattels during transit amounted to some £1,000. The present summons was taken out to have determined, among other questions, whether the costs of transporting from Monaco to England and insuring during transit possessions in Monaco specifically bequeathed to N. H. Bennett, ought to be borne by the specific legatee or by the testatrix's residuary estate.

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J. A. Plowman for the plaintiff.

H. E. Francis for the specific legatee. The costs of transporting and insuring the chattels are payable out of residue: see *Theobald on Wills* (10th ed.), p. 574. It is "part of the duty of executors to get in all the testator's estate, whether specifically bequeathed or otherwise," *per* Lord Langdale M.R. in *Perry v. Meddowcroft*.¹ Parker J.'s criticism of *Perry v. Meddowcroft*¹ in *In re De Sommers*² is not directed at that general proposition.

*In re Hewett*³ is direct authority for the proposition that these costs are payable out of residue. True there are dicta in *In re Scott*⁴ to the contrary, but the present question was not directly in issue in that case. It is submitted that Phillimore L.J.'s statement on the point⁵ is not inconsistent with the present submission.

[He also referred to *In re Sivewright*⁶; *In re Leach*.⁷]

D. H. McMullen for the residuary legatee. These costs must be borne by the specific legatee. *In re Hewett*⁸ is inconsistent with the decision of the Court of Appeal in *In re Scott*.⁹ It would appear that *In re Scott*⁹ was not brought to the attention of the court in *In re Hewett*.⁸ In the present case the executors must be taken to have assented to this legacy and therefore these costs are payable by the specific legatee: see *In re Grosvenor*¹⁰ where Astbury J. applied *In re Scott*.⁹

HARMAN J. [having stated the facts:] The question is whether the costs of transporting these chattels to England and of insuring them in transit ought to be borne by the residuary estate or by the defendant. At first sight, I should have thought clearly the latter. Foreign assets do not vest in executors *virtute officii*. If

¹ (1841) 4 Beav. 197, 204.⁶ [1922] W.N. 338.² [1912] 2 Ch. 622, 628.⁷ [1923] 1 Ch. 161.³ [1920] W.N. 366; 90 L.J.Ch.⁸ [1920] W.N. 366; 90 L.J.Ch.

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⁴ [1915] 1 Ch. 592, 606, 610.⁹ [1915] 1 Ch. 592.⁵ [1915] 1 Ch. 592, 610.¹⁰ [1916] 2 Ch. 375.

HARMAN J. there are debts and no sufficient assets in England to meet them, it may be the duty of English executors to possess themselves of any foreign assets. All they need do is to satisfy themselves that they have sufficient assets to pay the debts here.

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In *In re Scott*,¹¹ there were foreign assets in France, namely, various pictures, engravings and works of art which were given to Lady Sackville; and the question arose who should bear the French duty in respect of the chattels and the cost of transporting them to England. Lord Cozens-Hardy M.R. said ¹²: "It is said "that it is the duty of an executor, where there is a specific "bequest of property which is in a foreign country, to go to that "foreign country and to procure the specific article, to pay what "is necessary in order to get it, and to bring it back to this "country. Each one of us has asked, I think, for a statement "by any text-writer to support that proposition. I can find none, "and it is conceded there is none. Is there anything in principle "which can justify it? I think not, for many reasons, but the "one that strikes me most is this. When there is a specific "legacy the first duty of the executor is to consider whether he "assents to it or not. If he assents to it the property passes out "of him and is in the specific legatee, and from that moment "the executor cannot possibly interfere with the possession of "the chattels, cannot claim them from anybody else, and the "legatee who has the legal title is the person to recover them, "and to do what is necessary." That seems to me to cover the present case. Phillimore L.J. said much the same thing ¹³: "I know of no authority that the executors are bound "to bring a chattel to the testator's domicile, or to bring it from "foreign parts in order to deliver it to the legatee. If the "argument is worth anything it would involve this, that when- "ever chattels specifically bequeathed are locally situated in "some foreign country, and there is a duty of any sort payable "on these chattels by reason of the death of the testator, it "falls to the executors to redeem these chattels, to ransom them, "as it were, from the foreign country, and bring them away and "deliver them safely to the legatee. By this time of day if "there were any such duty upon executors there would have been "authority for it, and I decline to hold that there is any such "duty." Those observations seem to me to be quite categorical. They were followed by Astbury J. in *In re Grosvenor* ¹⁴ who cited

¹¹ [1915] 1 Ch. 592.

¹² *Ibid.* 606.

¹³ [1915] 1 Ch. 592, 610.

¹⁴ [1916] 2 Ch. 375.

also the decision of Parker J. in *In re De Sommery*.¹⁵ Although *In re Grosvenor*¹⁴ was a different case and concerned mortgages, it shows that the judge accepted *In re Scott*¹⁶ as being the law.

My attention was drawn to *In re Hewett*,¹⁷ a decision of Russell J., who held that: "the reasonable and proper view is "that the executors here are entitled to pay, and indeed should "pay, all the costs of packing these articles [chattels in Hong "Kong] and having them conveyed to the country where the "executors are for the purpose of having them distributed among "the persons entitled." *In re Scott*¹⁸ was not cited to the court in *In re Hewett*¹⁷ and I cannot suppose that anything in the latter case can overrule the categorical statements of the Court of Appeal in *In re Scott*.¹⁶

I must, therefore, hold that it is not the duty of executors as such to go to the foreign country where incidentally they have no standing at all, and obtain these chattels and bring them back here. All they needed to do was to assent, which they must be taken to have done. They having assented, the specific legatee must go and get the chattels. If an assenting executor, having become a trustee, incurs expense at the request of the specific legatee he is entitled to be indemnified as a trustee is always so entitled. Therefore, in my judgment, these costs may not come out of the residuary estate.

Order accordingly.

Solicitors: *Bircham & Co.; Callingham, Griffith & Bate; Boyce, Evans & Sheppard.*

¹⁴ [1916] 2 Ch. 375.

¹⁵ [1912] 2 Ch. 622.

¹⁶ [1915] 1 Ch. 592.

¹⁷ [1920] W.N. 366; 90 L.J.Ch. 126, 128.

In re ART REPRODUCTION CO. LD.

[No. 00455 of 1951.]

WYNN-
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1951
Nov. 5.

Company—Voluntary winding up—Statute-barred debts—No power to discharge unless contributories consent—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), ss. 257 (1); 302, 316, 317.

In the voluntary winding up of a solvent company, statute-barred debts cannot be paid unless the contributories consent.

Per Curiam: it would be quite illogical if there should be one rule in a compulsory liquidation [as laid down in *In re General*

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Rolling Stock Co. (1872) L. R. 7 Ch. 646], and another rule in a voluntary liquidation.

In re General Rolling Stock Co. (supra) applied; *In re Fleetwood and District Electric Light and Power Syndicate Ltd.* [1915] 1 Ch. 486 considered.

MOTION on appeal from the registrar of the Companies Court.

In 1950 the company went into voluntary liquidation. It was solvent, in so far as the assets were sufficient to discharge all provable debts, and to provide a surplus for the contributories which was less than the nominal value of their shares.

The applicant, a former managing director, sought to prove in the liquidation in respect of two claims, which were rejected by the liquidator. On appeal to the registrar, the claims were rejected as being statute-barred. The contributories had not assented to the payment of the claims.

F. Bower Alcock for the applicant [after conceding that one head of claim was barred, and contending that the other claim was a specialty debt and not barred]. Even if the applicant's claims are barred, there is jurisdiction to order the liquidator to pay them. *In re Fleetwood and District Electric Light and Power Syndicate*¹ is distinguishable, and is no authority to the contrary, as in that case there was a subsisting order that the liquidator was to apply the funds in hand "in due course of "administration," and the decision was founded on that order.

It is shown in Halsbury's Laws of England (2nd ed.), vol. 14, at p. 326, that a residuary legatee cannot prevent an executor from paying a barred debt, unless it has been declared to be barred by the court, or unless an administration order has been made. That principle should be applied by analogy in this case: see also *In re Wenham*.²

[WYNN-PARRY J. There is a difference between the position of a legatee, the recipient of a testator's bounty, and that of a shareholder who has contractual rights, which are governed by statutory provisions in a winding up.]

So far as the Companies Act, 1948, is concerned, the sections applicable are sections 302, 316 and 317.

[*P. J. Sykes*, for the liquidator, intervening: Section 257 (1) is also material.³]

¹ [1915] 1 Ch. 486.

² [1892] 3 Ch. 59.

³ Companies Act, 1948, s. 257 (1):
"As soon as may be after making a
"[compulsory] winding-up order, the

"court . . . shall cause the assets of
"the company to be collected, and
"applied in discharge of its liabilities."
Section 302: "Subject to the provi-
"sions of this Act as to preferential

Sections 316 and 317 apply to all forms of winding up. While section 317 indicates that when the company is insolvent the bankruptcy rules are to apply, so that the liquidator could not admit a statute-barred debt, section 316 provides that when the company is solvent "all debts . . . shall be admissible to "proof"; it is submitted that section 316 states the general rule, while section 317 makes an exception in an insolvency.

P. J. Sykes for the liquidator [having argued that the second head of claim was barred]. The rights of creditors in a winding up are governed by the provisions of the Companies Acts for the time being. It is adopting a false and incorrect analogy when it is sought to apply the law as to creditors' rights against executors.

Section 257 (1) applies to compulsory liquidations, and section 302 to voluntary liquidations, but both refer to the discharge or satisfaction of "liabilities": that word cannot have different meanings in the two sections. The word "liabilities," as it appeared in section 98 of the Act of 1862, with which section 257 (1) corresponds, was construed by James and Mellish L.JJ. in *In re General Rolling Stock Co.*,⁴ as meaning the liabilities of the company existing at the date of the winding-up order. A "liability" cannot be something, such as a barred debt, which the company is not bound in law to pay. It follows that section 302 does not authorize the payment of a barred debt. It would also be absurd if different rules were to prevail in compulsory and voluntary liquidations; a compulsory liquidation does not necessarily import insolvency.

In Buckley on the Companies Acts (12th ed.), it is said at p. 634, that a barred debt "*semble*, cannot even in a solvent "voluntary liquidation properly be paid against the wishes of the "contributories." It is submitted that this passage should more

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"payments, the property of a company
"shall, on its [voluntary] winding up,
"be applied in satisfaction of its
"liabilities *pari passu*. . . ."

Section 316 ("Provisions applicable
"to every mode of winding up"):
"In every winding up (subject, in
"the case of insolvent companies,
"to the application in accordance with
"the provisions of this Act of the law
"of bankruptcy) all debts payable on a
"contingency, and all claims against
"the company, present or future,
"certain or contingent, ascertained or

"sounding only in damages, shall be
"admissible to proof against the
"company. . . ."

Section 317 (similarly applicable):
"In the winding up of an insolvent
"company registered in England the
"same rules shall prevail and be
"observed with regard to the respec-
"tive rights of secured and unsecured
"creditors and to debts provable . . .
"as are in force for the time being
"under the law of bankruptcy in
"England. . . ."

⁴ (1872) L. R. 7 Ch. 646.

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properly read "cannot . . . properly be paid unless the
"contributories consent."

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Alcock in reply.

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WYNN-PARRY J. [after holding that the applicant's second claim was statute-barred]. It was contended on behalf of the applicant that, even if both parts of the claim were statute-barred, nevertheless there is jurisdiction to authorize the liquidator to pay the claims; and that, in the circumstances of this case, the court ought to exercise that jurisdiction. Both the liquidator and the registrar, it is clear, had considerable sympathy for the applicant; and I do not differ from either of them; but the question being one of jurisdiction, in the first place, the matter has to be considered strictly.

Mr. Alcock, for the applicant, said in the course of his argument that one of the difficulties which had faced both the registrar and those who had had to deal with the matter was the case of *In re Fleetwood and District Electric Light and Power Syndicate Ltd.*,⁵ a decision of Astbury J. That was a case concerning a voluntary liquidation in which the liquidator, having surplus assets available for distribution, took out a summons to ascertain whether he was at liberty to pay statute-barred creditors, thus raising upon the face of the summons quite directly the question which is before me today. At the hearing, the statute-barred creditors contended that the liquidator was entitled to pay them, but the shareholders contended that he was not. The court declined to answer the question specifically, but directed the liquidator to apply the assets "in the due course of "administration." In order to have the matter finally determined, the liquidator paid £50 to the defendants to the summons who represented the statute-barred creditors, and on that a friendly summons was issued to ascertain whether or not that was a proper payment, and, if not, that directions for repayment should be given.

Astbury J. at the outset of his judgment said⁶: "It seems "a startling proposition to suggest that in a due course of "administration in a voluntary winding-up the liquidator is "entitled to pay statute-barred debts"; and with that statement I am, with all respect, in complete agreement. He continued: "I am told there is no direct decision on the point and I must "therefore decide it in accordance with the decisions on analogous "courses of administration."

⁵ [1915] 1 Ch. 486.

⁶ Ibid. 490.

With that direction to himself in mind, Astbury J. considered a number of authorities and appeared to be inclined to apply by way of analogy the rules governing administration in the court of Chancery; but at the end of his judgment he pointed out that in the case before him there was already an order of the court directing the liquidator to apply the balance in his hand "in the "due course of administration," and observed that the meaning of that order was, that the shareholders having in that proceeding formally objected to the payment of the statute-barred creditors, the liquidator, who was a party and heard the objection taken, could not, upon the basis of applying the assets in the due course of administration, pay the statute-barred debts. The result, therefore, is that the question before me is left entirely open.

As I have said, Astbury J. proceeded on the basis that, as there was no direct decision on the point, he must decide it in accordance with the decisions on analogous courses of administration. With the greatest respect, I cannot feel that that is the correct approach to the problem. In my view, it is first necessary to look at the relevant statute (in this case the Companies Act, 1948) and see whether, within the language of that statute, there is or is not guidance as to the course which the court in a case like this should follow. I therefore turn to the Act. [His Lordship read section 257 (1), and sections 302, 316 and 317, and continued:]

It was urged upon me on behalf of the applicant that a comparison of sections 316 and 317 showed that section 316 enunciated the general rule, and that section 317 was designed to provide an exception; and that the rules in bankruptcy would only apply in the case of a company which was insolvent. So be it; but that does not seem to me to be in any way decisive of the problem before me.

I turn back to section 257, which provides that the court is to cause the assets of the company to be collected and applied in discharge of its liabilities, and compare that with the language of section 302, which provides, in the case of a voluntary winding-up, that "the property of a company shall, on its winding-up, be "applied in satisfaction of its liabilities *pari passu*."

There appears to me no context which would justify placing upon the word "liabilities" in section 302 any different interpretation or meaning from that which is to be attributed to that word in section 257; but further in the case of the section corresponding to section 257 under the Act of 1862 there has been judicial pronouncement.

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In *In re General Rolling Stock Co.*,⁷ James L.J. quoted section 98 of the Act of 1862 and proceeded: "A duty and a trust are thus imposed upon the court, to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the winding-up order was made which gives the right. It appears to me that it would be most unjust if any other construction were put upon the section." Mellish L.J. said: "It appears to me to be the clear meaning of that section, that the assets should be applied in satisfaction of all the liabilities which existed at the time of the winding-up order."

In Buckley on the Companies Acts (12th ed.), at p. 634, in the notes to section 316, it is said: "But, of course, a debt barred at the date of the order cannot be proved"; and for that proposition there is cited *Mitchell's Claim*,⁸ which, in my judgment, bears out that proposition; for in that case it appears that the proposition to the contrary was not even argued. The note continues: "and, *semble*, cannot even in a solvent voluntary liquidation properly be paid against the wishes of the contributories."

Mr. Sykes, for the liquidator, contended that that statement in its present form was, if anything, too cautious, and ought to read: "and, *semble*, cannot even in a solvent voluntary liquidation properly be paid unless the contributories consent." In my judgment, that would be a correct statement of the law.

In view of the law, as indicated above, which prevails in a compulsory liquidation, and in consequence of the view which I take upon a comparison of sections 257 and 302, it follows that the statements of the Lords Justices in *In re General Rolling Stock Co.*,⁹ and the comment in Buckley on the Companies Acts, must apply and, in my judgment, do apply in the case of a voluntary winding-up.

If this were not the case, I can see nothing but confusion resulting. There are, as was pointed out by Mr. Sykes, many cases in which the court makes a compulsory order to wind up a company which is not insolvent. There are other cases in which a company goes into voluntary liquidation and it may be either solvent or insolvent. It appears to me to be quite illogical that there should be one rule in a compulsory liquidation, and another

⁷ L. R. 7 Ch. 646.

⁹ L. R. 7 Ch. 646.

⁸ (1871) L. R. 6 Ch. 822.

rule in a voluntary liquidation; and that the only safe rule and the only course consonant with common sense is to have one rule which can be applied in both compulsory and voluntary liquidations.

On that review of the sections and of the authorities, I find it unnecessary to go outside the language of the Act in order to answer the question which I have to determine; and I therefore find it unnecessary to rely on the analogy of the administration of estates in the Chancery Division.

In the result I dismiss the appeal.

Appeal dismissed.

Solicitors: *Doyle, Devonshire & Co.; E. F. Turner & Sons.*

F. R. D.

UNIVERSAL PERMANENT BUILDING SOCIETY v.
COOKE AND OTHERS.

[1951 U. 748.]

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Oct. 22, 23.

Evershed M.R.,
Jenkins and
Morris L.JJ.

Landlord and Tenant—Letting by contracting purchaser—Subsequent completion of purchase—Mortgage next day—Power of leasing excluded except with consent of mortgagee—Tenant's claim to legal tenancy.

By an agreement dated November 8, 1948, the mortgagor agreed to buy a freehold shop with flat over. She was not to have possession until completion in December, 1948. She offered to let the flat to her sister at 25s. a week. The sister accepted and paid rent as from December 13, receiving a rent book, and went into possession on December 16. By a conveyance dated December 28, 1948, the premises were conveyed to the mortgagor in fee simple for the consideration of £1,850, and next day she mortgaged the premises to a building society to secure payment of a loan of £1,550 and interest by instalments. In 1951 the mortgagor being in default with payment of instalments of principal and interest the mortgagee obtained judgment for possession subject to the tenancy of the flat. On appeal from the decision as to the tenancy:—

Held, that in the absence of evidence that the conveyance and mortgage were all one transaction, there was an interval during which the mortgagor was the unincumbered owner of the premises in fee simple; and that, as a result, the tenancy by estoppel of the

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sister was completed and became a tenancy by law in priority to the mortgage, the estoppel being fed by the legal interest of the mortgagor.

Decision of Romer J. on this point reversed.

Coventry Permanent Economic Building Society v. Jones [1951] W.N. 218; [1951] 1 T.L.R. 739; [1951] 1 All E.R. 904 distinguished.

The statement by Martin B. in *Cuthbertson v. Irving* (1859) 4 H. & N. 742, 757 explained.

Per Jenkins L.J.: The decision of Romer J. that an oral contract is not capable of registration under the Land Charges Act, 1925, should not be regarded as authoritative.

APPEAL from Romer J.

By an agreement dated November 3, 1948, the defendant, Mrs. Cooke, agreed to buy from one Salthouse a freehold shop, with flat above, at 168 Lodge Lane, Liverpool, for the sum of £1,850. She had previously applied, on October 15, 1948, to the plaintiff building society, for an advance of £1,550, repayable over twenty years, secured on those freehold premises.

During October, 1948, the defendant Mrs. Cooke had told her sister, the defendant Mrs. Gavine, that she was negotiating for the purchase of 168 Lodge Lane, and she offered to let the flat to her on a weekly tenancy. This offer was accepted. At the beginning of December, 1948, Mrs. Gavine was told by her sister that the purchase was completed and she was offered the flat on a weekly tenancy at a rent of 25s., which she accepted. She paid the rent as from December 13, when she was given a rent book, and she went into possession on December 16.

By a conveyance dated December 28, 1948, the premises were conveyed to Mrs. Cooke for the consideration of £1,850. By a mortgage dated December 29, 1948, she mortgaged the premises by demise to the society for the term of 3,000 years subject to redemption to secure the sum of £1,550 and interest on the usual terms as to repayment by instalments. Clause 10 of the mortgage provided that the power of leasing by the mortgagor was not to be exercised without the leave of the society.

On February 28, 1951, instalments of principal and interest being in arrear, the society took out an originating summons (afterwards amended on April 5 and June 26, 1951) claiming payment of the amount due, and in default possession as against the mortgagor, the tenant and others, including the trustee under a deed of assignment executed by the mortgagor for the benefit of creditors. Neither the mortgagor nor the trustee resisted the claim for possession, and the only question was whether on an

order for possession the tenant continued to be a weekly tenant of the flat. Two other persons made party to the summons were persons living in the flat with the tenant.

Romer J. held, first, that although the conveyance to the mortgagor and her mortgage to the society were made on successive days, they were all one transaction. The case, therefore, could not be distinguished from Harman J.'s decision in *Coventry Permanent Economic Building Society v. Jones*,¹ where the giving of a rentbook to tenants before completion of the purchase having created a tenancy by estoppel, it was held that there was no *scintilla temporis* between a conveyance and a mortgage executed consecutively as one transaction, during which the tenancy by estoppel became effective as a legal tenancy in precedence to the mortgage. But, secondly, he held that the oral contract of tenancy did not require registration under the Land Charges Act, 1925, with the result that the oral contract had priority to the mortgage. The society appealed, but the only question decided was whether the decision on the first point was correct; and this part of the arguments is alone set out.

Montgomery White K.C. and *W. Lyon Blease* for the society. Romer J. was right in holding that there was no interval of time between the conveyance and the mortgage, although they were dated on consecutive days. It was all one transaction and therefore Harman J.'s decision in *Coventry Permanent Economic Building Society v. Jones*¹ applied. The court is asked to assume that the money lent on the mortgage was paid over direct to the vendor as part of the consideration on the completion of the purchase. It can make no difference that it was next day that the mortgage to the society was executed which provided that no lease was to be granted without the leave of the society.

If a person having no estate in property purports to grant an estate to another person which is thus only an estate by estoppel and the grantor acquires the unincumbranced legal estate in the property, this is said to feed the estoppel and convert it into a legal estate. Here, however, Mrs. Cooke had an equitable estate in 168 Lodge Lane and she must be taken to have granted an oral equitable tenancy in the flat to Mrs. Gavine. In such a case there is no question of feeding the estoppel. This is made clear in *Cuthbertson v. Irving*.²

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¹ [1951] 1 T.L.R. 739; [1951] 1

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² (1859) 4 H. & N. 742, 757.

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Upjohn K.C. and *Owen Hughes* for the defendant *Mrs. Gavine*. *Mrs. Gavine* took a legal tenancy in priority to the mortgage to the society. That was so by reason of the feeding of the estoppel. It is true that there was no legal estate in the property at Liverpool vested in *Mrs. Cooke* at the time she told *Mrs. Gavine* that she could go into possession of the flat at a weekly rent of 25s. But on December 28, 1948, the conveyance to *Mrs. Cooke* vested the legal estate in the property in her, and *Mrs. Gavine*, by estoppel, took a legal weekly tenancy relating back to December 16: see as to law in relation to this 13 Halsbury's Laws of England (2nd ed.), p. 504, and *Spencer's* case.³ This is the position apart from the mortgage, but how can the purchase and the mortgage granted a day after the purchase be treated as one transaction? There is no evidence to support this and "a deed takes effect from delivery": *Norton on Deeds* (2nd ed.), p. 189. The deed of December 28 was a perfectly simple conveyance vesting the legal estate of the property in *Mrs. Cooke*, and it was only next day that she mortgaged it. The legal estate then fell to *Mrs. Gavine's* estate by estoppel and *Coventry Permanent Economic Building Society v. Jones*¹ has no application. If they were wrong as to this they would argue that the *Coventry* case¹ was wrongly decided and that there must always be a point of time between when the owner gets the legal estate in the property and when he mortgages it. [He was stopped.]

Montgomery White K.C. in reply.

EVERSHED M.R. This appeal raises an interesting, and I think difficult, question. The defendant, *Mrs. Lily Gavine*, claims to be entitled to remain in possession of the flat at 168 Lodge Lane by virtue of a valid tenancy. It is only a weekly tenancy, and, apart from particular statutory provisions, there would be no point in her claim because notice determining the tenancy could be given. But, as is well known, the Rent Restriction Acts sometimes come in to preserve and protect the occupation of tenants such as *Mrs. Gavine*, and it is conceded that, if her tenancy is one which is good against the society she is entitled to rely upon the Rent Restriction Acts and to resist an order for possession against her. In the result *Romer J.* came to the conclusion that he could not make an order for possession in respect of the tenancy, and it is from that refusal that the present appeal has been brought. [His Lordship stated the facts.]

¹ [1951] 1 T.L.R. 739; [1951] 1 All E.R. 902.

³ (1583) 1 Sm.L.C., 13th ed., 51, 100; 5 Co.Rep. 16a.

On these facts two questions arise. The first question is whether, as Mrs. Gavine's possession, under the bargain she made with her sister, began before the date of the mortgage (and of the completion of the sale to Mrs. Cooke), she can assert that she acquired a valid interest or estate by estoppel and so avoid the result which would otherwise flow from such cases as *Dudley and District Benefit Building Society v. Emerson*,⁴ that where, as here, the mortgagor's right to grant leases under section 99 of the Law of Property Act is excluded by the terms of the mortgage, a tenant deriving title from the mortgagor was disabled from relying on the Rent Restrictions Acts against a mortgagee setting up a title paramount. If the estoppel point is well founded, then the title of the mortgagee is not paramount; for, on this assumption, Mrs. Gavine would have acquired a legal interest in the premises prior to that of the mortgagee.

For reasons which I will later state the learned judge rejected that point, and there then arose a second question: assuming no legal interest, still Mrs. Gavine was in possession at the date of the mortgage, and could it not be said against the society as the mortgagees that they had constructive notice of an equitable right and could not claim to evict Mrs. Gavine? It was that point which the learned judge answered against the claim of the society, and, relying upon it, refused the order for possession against the relevant defendants. It was necessary for the judge to consider in that connexion whether the right that Mrs. Gavine had on this hypothesis was an estate contract which should have been registered pursuant to section 10 of the Land Charges Act, 1925, so that, in default of such registration, the society would be unaffected by the interest of Mrs. Gavine. The learned judge thought that the right was not based on a contract which could have been registered and, therefore, on the principles set out in *Hunt v. Luck*,⁵ regarded the society as fixed with constructive notice of the right of Mrs. Gavine and so refused the order for possession.

I have said that the questions are, as I think, questions of real difficulty; but, according to the learned judge's judgment, the estoppel point turned very much upon an earlier decision of Harman J. in *Coventry Permanent Economic Building Society v. Jones*.⁶ That was a case similar to the present in all relevant respects, save one: in that case, the date of the conveyance to the mortgagor and the date of the mortgage to the plaintiff society

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⁴ [1949] Ch. 707.

⁵ [1902] 1 Ch. 45.

⁶ [1951] 1 T.L.R. 739; [1951] 1 All E.R. 902.

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were the same; and, according to Mr. Blease, who appeared as counsel in that case, it was conceded, for the purposes of the argument, that in truth, though there were two deeds there was but one transaction. There being but one transaction, therefore, Harman J. said that there was no *scintilla temporis* during which the mortgagor could be treated as having any legal estate or interest in the premises. And from that it followed again that no question of an estate or demise by estoppel could arise, for the necessary condition to the estoppel being fed, namely, the subsistence of the legal estate in the lessor, was absent.

In this case the difference is that the conveyance to Mrs. Cooke; the mortgagor, is dated December 28 and the mortgage is dated December 29. Romer J. expressed no view of his own whether he agreed with Harman J.'s decision in the *Coventry* case.⁶ He said merely: "I do not regard myself as at liberty to depart from so recent a decision of Harman J." Following it, therefore, he had to consider the point whether the dates I have mentioned created a distinction sufficient to produce a different result. He said "No." The relevant part of his judgment is this: "The only difference . . . is that in *Coventry Permanent Economic Building Society v. Jones*⁶ the conveyance and the mortgage were both executed on the same day. Here the mortgage was executed one day after the conveyance to Doris Cooke, but Mr. Blease says that it is plain that the purchase and the mortgage were one transaction and not two, so that the case falls within the ratio decidendi of Harman J. on that point. Mr. Hughes, for the occupiers, disputes that, relying principally on the fact that the conveyance and mortgage were separated by a space of time which was absent in the other case. I am unable to accept that as a sufficient distinction. "It is quite clear that the completion of the purchase and the execution of the mortgage on consecutive days were one transaction, and it would be introducing too much refinement to say that a gap of twenty-four hours distinguished the case before me from that decided by Harman J."

Mr. Upjohn was armed with the necessary material to attack the decision of Harman J. in the *Coventry* case.⁶ In the circumstances, we have not heard his argument, nor Mr. Montgomery White's argument in defence; but, with all respect to Romer J., I have been unable to agree that on the facts of this case as proved it can properly be said that there is, because of the dates, no distinction between this case and the *Coventry* case,⁶ and, in

⁶ [1951] 1 T.L.R. 739; [1951] 1 All E.R. 902.

particular, that it can be said to be quite clear that the completion of the purchase and the execution of the mortgage were one transaction.

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The only evidence on the matter is that of a Mr. William Young Proud, who is the assistant secretary of the society, and who deposed to the facts stated by him from information he had obtained in his office as secretary. The total purchase price which Mrs. Cooke had to pay was £1,850; the amount of the advance was £1,550. In para. 4 of Mr. Proud's affidavit he says: "The said property was conveyed to the said defendant for an estate in fee simple by a conveyance dated December 28, 1948. As above stated the said defendant mortgaged the said property to the society on December 29, 1948. The said defendant was expressed to mortgage the said property as beneficial owner and the said mortgage did not disclose that the property was at the date thereof subject to any tenancy or in the occupation for any estate or interest of any other person." There is nothing in Mr. Proud's short statement which states that the conveyance and the mortgage were part of a single transaction. No information is given as to the way in which completion took place. One may guess that the society handed over the sum of £1,550 to the vendor, Salthouse, but it is nowhere so stated and it cannot be regarded as certain. It is not uncommon to see a conveyance in fee simple to A and then a mortgage by him some little time afterwards. A may temporarily borrow the money and then pay the money over. I must, I think, accept the evidence as I find it stated by Mr. Proud, and on that evidence I think the court is bound to treat these two transactions as being two independent transactions, the mortgage taking place a day after the conveyance. If that is so, it then becomes necessary to consider the result.

Mr. Upjohn pointed out, and Mr. Montgomery White has not really contested this proposition, that deeds take effect from the time of their delivery and that prima facie the time of delivery is the date on the deed. It follows that in the interval of time between December 28 and December 29 Mrs. Cooke must be treated as having had vested in her the unencumbered fee simple. What is the result? Mr. Montgomery White argued, with force and ingenuity, that there is no room here for the doctrine of feeding the estoppel to operate, since although Mrs. Cooke had no legal estate in these premises on December 16 (when she let her sister into possession), she had then a perfectly good equitable right to the property in fee simple by virtue of her contract; and

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that Mrs. Gavine's possession and the right she acquired from Mrs. Cooke were properly referable to the equitable estate which alone Mrs. Cooke had. In those circumstances, Mr. Montgomery White argued that the doctrine of estoppel was excluded.

I have already stated that on the facts as proved there is no question here of any actual representation on Mrs. Cooke's part that she only had an equitable right. The facts are to the contrary. But the validity of Mr. Montgomery White's proposition rests, I think, putting it quite briefly, upon a statement which is found at the end of the judgment of Martin B., giving the judgment of the Court of Exchequer in *Cuthbertson v. Irving*,⁷ where, after examining a number of cases, he states⁸ that: "The following propositions may be laid down: First"—and this is the relevant one—"if any estate or interest passes from the lessor, or the real title is shown upon the face of the lease, there is no estoppel at all." In my judgment, when the matter is looked at more closely, and particularly when regard is had to the facts of the case as briefly set out by Wightman J., giving the judgment of the Court of Exchequer Chamber,⁹ it is plain that by "any estate or interest" Martin B. meant "any legal estate or interest"; and that indeed is in accordance with what Martin B. had earlier said¹⁰ when referring to *Pargeter v. Harris*¹¹: "There are some points in the law relating to estoppels which seem clear. First, when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground." Moreover, in the case of *Cuthbertson v. Irving*⁷ itself, the question arose whether the assignee of a mortgagor, who had therefore, at the date of the purported demise, only an equitable title, was able to rely upon estoppel against the lessee; and the judgment of the court delivered by Wightman J. said¹²: "The answer is, for the plaintiff, because the lessee is estopped from denying that the plaintiff had such a legal estate as would warrant the lease, and as no other legal estate or interest is shown to have been in the lessor, it must be taken as against the lessee, by estoppel, that the lessor had an estate in fee."

I accept, of course, the view that if the *soi-disant* lessor has any legal estate, though a legal estate less in extent than that purported to be granted, the doctrine of feeding the estoppel is excluded. But I do not think it is excluded where the only right

⁷ (1859) 4 H. & N. 742.⁸ *Ibid.* 757.⁹ (1860) 6 H. & N. 135.¹⁰ 4 H. & N. 754.¹¹ (1845) 7 Q.B. 708.¹² 6 H. & N. 139.

the lessor had was an equitable estate or interest. Here, Mrs. Gavine was let into possession by what purported to be the creation orally of a tenancy of the flat in which she was given, or was intended to be given, by Mrs. Cooke a legal right to possession. At the time Mrs. Cooke had no such interest in the premises as would support the giving of the right. True, she was able to make a contract, a promise, to give it. But she had no right, so far as the evidence goes, to give Mrs. Gavine the privilege of possession of these premises.

It was pointed out that the vendor, Mr. Salthouse, should have been aware of what took place and that he should be regarded in some way as a party to the grant. But there is, again, no evidence about Mr. Salthouse save that by the terms of the contract Mrs. Cooke had no right to enter into possession of any part of the premises until completion. If she had, it is possible that different considerations would have applied; but in the absence of any such right it seems to me that this case is indistinguishable from the other cases in which the person put into possession and given what purported to be a lease is, if the lessor afterwards acquires a legal estate, entitled, by the doctrine of estoppel, to rely upon the right purported to be given; the estoppel is, as it is said, fed by the legal interest later acquired by the lessor.

If I am right in saying, on the facts here, that there was from December 28 to December 29 vested in Mrs. Cooke the fee simple of 168 Lodge Lane, then it seems to me that the estoppel was fed by that interest and so there came into being in Mrs. Gavine a legal interest or right to possession which was prior in date to the grant of the mortgage. This prevents the society, as mortgagees, from relying on the *Dudley* case¹³ and saying that their title is paramount to that of Mrs. Gavine. The mortgagees must take subject to the weekly tenancy, and subject (which is much more important) to the effect of the Rent Restriction Acts upon that tenancy.

I think this case depends on its own facts. It may well be that in other cases it could be shown that, notwithstanding the divergences in date, there was really but one transaction, and if that is so then the question would arise whether Harman J.'s decision in the *Coventry* case¹⁴ should be followed. It is a decision which obviously has an appeal to common sense, but in the circumstances it is unnecessary for me to say anything

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¹³ [1949] Ch. 707.¹⁴ [1951] 1 T.L.R. 739; [1951] 1 All E.R. 902.

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further about it and I express neither affirmation of it nor the contrary; nor is it necessary for me to express any view on the other matter upon which Romer J. founded his decision. We have not heard full argument about it and I say nothing on it.

In the result, I think the order made by Romer J. was the right order, and the appeal should be dismissed.

JENKINS L.J. I agree, and find nothing I can usefully add on the question of the tenancy by estoppel and the feeding of the estoppel. As my Lord has said, the view taken by this court on that part of the case makes it unnecessary to consider here the question whether the interest, had it not been a legal interest, would have required registration or could properly be registered under the Land Charges Act, 1925, in order to preserve its priority. The learned judge's decision appears to have been founded, in part at all events, on an assumption that a contract was not capable of registration under the Act unless it was a contract in writing. That assumption the learned judge appears to have made on the strength of what he took to be something in the nature of an admission by Mr. Blease to the effect that an oral contract was not capable of registration as a land charge. Mr. Blease tells us he made no such admission, or, at all events, had no intention of doing so. Be that as it may, it does look as though that part of the learned judge's judgment turns either upon an inadvertent admission or upon some misunderstanding as to the way in which counsel really meant to put the case. It seems clear that in fact writing is not essential to the registrability of a contract or charge, for in section 10 (3) of the Act itself there is this provision: "Where a land charge is not created by an instrument, short particulars of the effect of the charge shall be furnished with the application to register the charge." I have thought it right to mention this point as it is plain that in the circumstances that part of the learned judge's judgment should not be regarded as authoritative.

MORRIS L.J. I am in agreement with the conclusion expressed by the Master of the Rolls and with the reasoning that guided my Lord in arriving at that conclusion.

Appeal dismissed.

Solicitors: *Hyde, Mahon & Pascall, for Clayton & Gibson, Newcastle-upon-Tyne; Le Brasseur & Oakley, for Shield, Schierwater & Symond, Liverpool.*

H. C. G.

In re ULLSWATER, DECED. BARCLAYS BANK LD. *v.*
LOWTHER AND ANOTHER.

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BURGH J.

1951
Nov. 7.

[1950 U. No. 1678.]

Will—*Construction*—*Payment of outgoings of estate*—*Equitable rule as to apportionment between capital and income*—*Direction in will that income from unsold property be applied as if it were “income arising from . . . investments . . . to be made of the proceeds of “sale . . .”*—*Rule not excluded.*

The testator devised and bequeathed his real and personal estate to trustees on trust for sale and conversion, with power to postpone sale. He directed: “the income of such of the same premises as for the time being shall remain unsold shall as well during the “first year after my death as afterwards be applied as if the same “were income arising from investments hereinafter directed to be “made of the proceeds of sale thereof. . . .”

On a summons taken out for the determination of, among other things, whether the effect of the direction was to exclude the rule in *Althusen v. Whittell* (1867) L.R. 4 Eq. 295:—

Held, that rule was not excluded.

ADJOURNED SUMMONS.

The testator, James William, Viscount Ullswater, made his will on October 22, 1942. He made two codicils in 1947 and 1948 respectively, the terms of which are not relevant.

He devised and bequeathed all his real and personal estate to the bank, who were the trustees, on trust for sale and conversion, with power to postpone sale, and he gave the following direction: “I direct that the income of such of the same premises as for the “time being shall remain unsold shall as well during the first “year after my death as afterwards be applied as if the same “were income arising from investments hereinafter directed to “be made of the proceeds of sale thereof and that no reversionary “or other property not actually producing income shall be treated “as producing income for the purposes of this my will and I “direct that the bank shall out of the moneys to arise from the “sale calling in and conversion of or forming part of my said real “and personal property and out of my ready moneys pay my “funeral and testamentary expenses (including all estate duty “leviable at my death in respect of my residuary estate but not “including” certain properties “which . . . shall bear their own “estate duty) and debts and shall also pay or provide for the “pecuniary legacies and annuities given by this my will or any

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1961

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DECD.

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BANK LD.

C.

LOWTHER.

" codicil hereto and the duty on all legacies and annuities hereby
" or by any codicil hereto bequeathed free of duty but so that all
" legacies and annuities and the duty on all legacies and annuities
" bequeathed free of duty shall be paid primarily out of my per-
" sonal estate and shall invest the residue of the said moneys in
" the name of the bank in or upon any of the investments for the
" time being authorized by the law for the investment of trust
" funds."

The trustees of his will took out the present summons for the determination of various questions of construction arising under the will. The question relevant to this report was whether, on the true construction of the testator's will, the plaintiffs, as executors and trustees, ought to be taken to have paid the debts, funeral and testamentary expenses and the pecuniary legacies bequeathed by the will and codicils, and the interest on them, out of such portion of the capital of the residuary estate as together with the income computed down to the respective actual dates of such payments would amount to the above-mentioned outgoings and the interest thereon.

The interest produced by the estate was less than the interest charged on the debts and death duties, and it was, therefore, in the interest of the tenant for life to argue that the rule in *Allhusen v. Whittell*¹ was applicable, and for the remainderman to argue that it was excluded.

B. S. Tatham for the plaintiffs.

M. J. Albery for the remainderman. The words in this clause may have been designed to exclude the rule in *Howe v. Lord Dartmouth*,² but their effect is also to exclude the rule in *Allhusen v. Whittell*.¹ The point is regarded as doubtful in *Key* and *Elphinstone's* *Precedents in Conveyancing* (14th ed.), vol. 2, p. 877, note (q). The form suggested there as expressly excluding the rule in *Allhusen v. Whittell*¹ cannot be distinguished as a matter of construction from the words in the present will, where "the same premises" must mean all the real and personal estate, including such part as is subsequently applied in the payment of debts.

The words used by the testator are inconsistent with the application of the rule in *Allhusen v. Whittell*¹ because he directed that the income of the "same premises" for the time being unsold (which must mean the income of the gross residue)

¹ (1867) L.R. 4 Eq. 295.

² (1802) 7 Ves. 137a.

shall be applied as if it were income arising from the investments of net residue, which means residue after the debts have been paid out of it.

The tenant for life on that hypothesis would be entitled to all the income on the property unsold. This shows that the rule in *Allhusen v. Whittell*³ is excluded so as to benefit the tenant for life, in so far as no part of the income is applicable in paying the capital of the debts. But if once the rule is excluded, the tenant for life must also bear the burden of that exclusion. The ordinary rule of administration where the rule is excluded is that interest on debts is an outgoing against income: see *Barnes v. Bond*.⁴

The words "as well during the first year as afterwards" may well have been inserted with express reference to the rule in *Allhusen v. Whittell*,⁴ which, as originally stated, was only applied in respect of the first year. [He also referred to *In re Waller*.⁵]

Denys Buckley for the tenant for life. The clause is framed solely for the purpose of excluding the rule in *Howe v. Lord Dartmouth*,⁶ which is only concerned with the question how income is to be invested. It has nothing to do with the rule in *Allhusen v. Whittell*,⁷ which is how successive interests are to be regulated. Unless a will expresses a clear intention to exclude the rule in *Allhusen v. Whittell*⁷ it will be included: see *In re Perkins*,⁸ *In re Poyser*,⁹ and *In re Wills*.¹⁰

A common form clause such as this could not be expected to exclude the rule. The way in which an administration would be worked out would be that admitted debts would be paid, but even if there were contingent debts, the executors would not be justified in not realizing part of the estate and investing it in authorized securities. The executors are under a duty to realize unauthorized investments; they cannot adhere too rigidly to the chronological order in the will.

If all the debts be notionally extinguished, the interest on them ceases to exist. Thus if the income of the property were applied as if the debts were discharged, the interest on them, as well as the debts themselves would in fact have to be paid out of capital.

Usually there is not much difference between the interest on

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³ (1863) 32 Beav. 653.

⁴ L.R. 4 Eq. 295.

⁵ [1916] 1 Ch. 153.

⁶ 7 Ves. 137a.

⁷ L.R. 4 Eq. 295.

⁸ [1907] 2 Ch. 596.

⁹ [1910] 2 Ch. 444.

¹⁰ [1915] 1 Ch. 769.

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DECD.,
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“ codicil hereto and the duty on all legacies and annuities hereby
“ or by any codicil hereto bequeathed free of duty but so that all
“ legacies and annuities and the duty on all legacies and annuities
“ bequeathed free of duty shall be paid primarily out of my per-
“ sonal estate and shall invest the residue of the said moneys in
“ the name of the bank in or upon any of the investments for the
“ time being authorized by the law for the investment of trust
“ funds.”

The trustees of his will took out the present summons for the determination of various questions of construction arising under the will. The question relevant to this report was whether, on the true construction of the testator's will, the plaintiffs, as executors and trustees, ought to be taken to have paid the debts, funeral and testamentary expenses and the pecuniary legacies bequeathed by the will and codicils, and the interest on them, out of such portion of the capital of the residuary estate as together with the income computed down to the respective actual dates of such payments would amount to the above-mentioned outgoings and the interest thereon.

The interest produced by the estate was less than the interest charged on the debts and death duties, and it was, therefore, in the interest of the tenant for life to argue that the rule in *Allhusen v. Whittell*¹ was applicable, and for the remainderman to argue that it was excluded.

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M. J. Albery for the remainderman. The words in this clause may have been designed to exclude the rule in *Howe v. Lord Dartmouth*,² but their effect is also to exclude the rule in *Allhusen v. Whittell*.¹ The point is regarded as doubtful in *Key and Elphinstone's Precedents in Conveyancing* (14th ed.), vol. 2, p. 877, note (q). The form suggested there as expressly excluding the rule in *Allhusen v. Whittell*¹ cannot be distinguished as a matter of construction from the words in the present will, where “ the same premises ” must mean all the real and personal estate, including such part as is subsequently applied in the payment of debts.

The words used by the testator are inconsistent with the application of the rule in *Allhusen v. Whittell*¹ because he directed that the income of the “ same premises ” for the time being unsold (which must mean the income of the gross residue)

¹ (1867) L.R. 4 Eq. 295.

² (1802) 7 Ves. 137a.

shall be applied as if it were income arising from the investments of net residue, which means residue after the debts have been paid out of it.

The tenant for life on that hypothesis would be entitled to all the income on the property unsold. This shows that the rule in *Allhusen v. Whittell*⁴ is excluded so as to benefit the tenant for life, in so far as no part of the income is applicable in paying the capital of the debts. But if once the rule is excluded, the tenant for life must also bear the burden of that exclusion. The ordinary rule of administration where the rule is excluded is that interest on debts is an outgoing against income: see *Barnes v. Bond*.³

The words "as well during the first year as afterwards" may well have been inserted with express reference to the rule in *Allhusen v. Whittell*,⁴ which, as originally stated, was only applied in respect of the first year. [He also referred to *In re Waller*.⁵]

Denys Buckley for the tenant for life. The clause is framed solely for the purpose of excluding the rule in *Howe v. Lord Dartmouth*,⁶ which is only concerned with the question how income is to be invested. It has nothing to do with the rule in *Allhusen v. Whittell*,⁷ which is how successive interests are to be regulated. Unless a will expresses a clear intention to exclude the rule in *Allhusen v. Whittell*⁷ it will be included: see *In re Perkins*,⁸ *In re Poyser*,⁹ and *In re Wills*.¹⁰

A common form clause such as this could not be expected to exclude the rule. The way in which an administration would be worked out would be that admitted debts would be paid, but even if there were contingent debts, the executors would not be justified in not realizing part of the estate and investing it in authorized securities. The executors are under a duty to realize unauthorized investments; they cannot adhere too rigidly to the chronological order in the will.

If all the debts be notionally extinguished, the interest on them ceases to exist. Thus if the income of the property were applied as if the debts were discharged, the interest on them, as well as the debts themselves would in fact have to be paid out of capital.

Usually there is not much difference between the interest on

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³ (1863) 32 Beav. 653.

⁴ L.R. 4 Eq. 295.

⁵ [1916] 1 Ch. 153.

⁶ 7 Ves. 137a.

⁷ L.R. 4 Eq. 295.

⁸ [1907] 2 Ch. 596.

⁹ [1910] 2 Ch. 444.

¹⁰ [1915] 1 Ch. 769.

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the debts and that on income. Here the rate of interest on income is very low, and the tenant for life is paying out more as interest on the debts than he receives as income.

Albery replied.

ROXBURGH J. This case raises a difficult question—whether this will excludes the rule in *Allhusen v. Whittell*.¹¹ I think that it is conceded that, unless it does, the rule is applicable.

The point is one of general importance, because the clause which is said to exclude the rule is one which is very commonly to be found in wills. The testator devised and bequeathed all his real and personal estate to the bank, who are the trustees, on trust for sale and conversion, with power to postpone sale, and gave the following direction: [His Lordship read the direction above set out].

The words which Mr. Albery submitted exclude the rule in *Allhusen v. Whittell*¹¹ are the well-known words: “I direct that the income of such of the same premises as for the time being shall remain unsold shall as well during the first year after my death as afterwards be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof.” It is well known that those words are primarily designed to exclude the rule in *Howe v. Lord Dartmouth*,¹² and undoubtedly they are effective for that purpose, but, of course, it does not follow that they could not have a construction bearing upon a problem which they were not primarily designed to cover.

Mr. Albery’s argument was to this effect, and for a long time it seemed to me most convincing; he said that it was not possible to make an investment out of the proceeds of sale until all the debts had been paid, because that is what the will provided, and read literally that is so. Therefore, he argued, ex hypothesi the debts must be deemed to have been paid somehow or other from some other fund, and this income—that is to say, the income of the property for the time being remaining unsold—must be payable to the tenant for life or other person beneficially interested without regard to the existence of debts, which ex hypothesi have been discharged. If the will be read literally, that, I think, is a fair grammatical construction, but it appears to me that it is open to such extraordinary consequences that I ought not to allow words written alio intuitu by mere grammatical construction to bear upon this other problem.

¹¹ L.R. 4 Eq. 295.

¹² 7 Ves. 137a.

Mr. Buckley's main argument was that the debt might be a future debt. It is immaterial whether in the present case there was any future debt, because these are words commonly found in wills, and I am not going to try to introduce some hair-splitting distinctions, with the result that they might mean one thing in one will and something different in another will. I attach great importance, therefore, to his argument whether or not there were future debts. There might have been a future debt in the shape of a covenanted annuity payable during somebody's lifetime, and future instalments might arise for many years. In such a case, according to the strict construction of this will, no proceeds of sale could be invested in the meantime, because the direction to invest is only to invest the residue of the moneys after payment of the debts, and as *ex hypothesi* there were future debts, the debts or all of them could not have been paid, and the direction to invest the residue could not be yet operating, and the residue would, I suppose, remain in the bank.

I think that is the literal construction of these words, but it would be a ludicrous result and one which I am sure no court has ever contemplated. The truth of the matter is that, though these operations are stated in chronological sequence, the words are not to be regarded as a mandatory direction to the trustees to adhere to the strict chronological sequence. In other words, it would obviously be quite proper for the trustees, notwithstanding that debts were still outstanding, to invest some proceeds of sale, not immediately required for the purposes of administration, in some authorized investment. That is the first ground which makes it necessary to reject Mr. Albery's submission.

The second is this: if the direction is to be applied on the footing that all debts are notionally extinguished, it must follow that all interest on debts is notionally extinguished too, because there could not be any interest on a debt if there were no debt. I should therefore have to hold that this direction contemplated not only that the debts had been discharged, but that all interest on debts had been discharged; and if I construe this as a direction to apply the income as though all interest on debts were discharged, then how could any interest on any debt be deducted from this income? The result would, I suppose, be that both the capital of a debt and the interest on it would have to be paid exclusively out of capital. That, of course, is a preposterous idea.

Mr. Albery sought to escape from this point by submitting that the phrase "I direct that the income of such of the same "premises as for the time being shall remain unsold" meant the

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net income of the gross estate; but it is not the gross estate. It is a part of the gross estate that is being referred to, namely, such as for the time being shall remain unsold. The phrase "net income", in relation to that, would mean what remains after subtracting from the income of that portion of the estate the outgoings of that portion of the estate, but it could not have any relation to the net income of the whole estate. It seems to me that that is an impossible argument. If, as Mr. Albery submitted, and as I am disposed to agree, "the same premises" means a portion of the gross estate, the phrase "income" must either mean the gross income or the net income of that portion of the estate. It cannot possibly refer to the net income of the whole estate.

Therefore in my judgment the argument of Mr. Albery does not meet the difficulty, and it seems to me that the only proper course is to say that these words, undoubtedly inserted alio intuitu, are not to be construed so as to have any bearing upon a problem with which nobody would expect them to be concerned, namely, the rule in *Allhusen v. Whittell*.¹³ In my judgment, they have no bearing on that rule; they therefore do not exclude it, and there is nothing else in the will which is put before me as excluding it.

Declaration accordingly.

Solicitors: *Foyer, White and Prescott; Ellis and Ellis; Preston, Lane-Claypon and O'Kelly for Herbert and Gowers & Co., Oxford.*

I. G. R. M.

¹³ L.R. 4 Eq. 295.

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In re FREELAND. JACKSON *v.* RODGERS.

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Oct. 23, 24;

Nov. 7.

[1950 F. No. 787]

Evershed M.R.,
Jenkins and
Morris L.JJ.

Administration—Imperfect gift of motor car—Possession not taken by donee—Donor's loan of motor car to third person—Donee appointed one of donor's executors—Whether gift perfected.

A testatrix was the owner of a Hillman motor car. The plaintiff alleged that in March, 1949, the testatrix gave her this motor car but that, since it had been immobilized during the war and was not then in a roadworthy condition, it was not delivered to the plaintiff

but remained in the testatrix's garage. The plaintiff further alleged that in May, 1949, the defendant's own car having broken down, the testatrix, with the plaintiff's consent, agreed to lend the motor car to the defendant. The testatrix put the motor car into running repair, the defendant took possession of it, and it had remained in her possession ever since. The testatrix, by her will dated June 30, 1949, appointed the defendant and the plaintiff to be her executrices. The testatrix died on April 8, 1950, and probate of her will was, on July 12, 1950, granted to the plaintiff and the defendant. The defendant having refused to part with the motor car, the plaintiff in this action claimed a declaration that she was the owner of the motor car and its delivery up by the defendant.

Danckwerts J. held that the imperfect gift made in the spring of 1949 in the plaintiff's favour had been perfected by her appointment as executrix:—

Held that the principle laid down in *Strong v. Bird* (1874) L.R. 18 Eq. 315 that an imperfect gift might be perfected by the subsequent appointment of the donee to be the donor's executor only applied where the donor had an immediate intention to make an out-and-out gift, and that intention survived until the donor's death. The principle had no application to the case where the donor had a mere intention to make a gift in the future. The plaintiff being the executrix of the testatrix claiming against her estate, the onus lay on her to prove her case. This she had not done. The evidence was incompatible with an immediate intention on the part of the testatrix to make a gift.

Per Evershed M.R. and Jenkins L.J.: The loan of the motor car by the testatrix to the defendant was fatal to the plaintiff's claim that there was a continuing intention on the part of the testatrix to make an immediate gift. (The principle of *Strong v. Bird*, *supra*, was directed to perfecting gifts complete in all respects except as regarded the legal formalities necessary for the proper transfer of title to the particular property in question.) It was confined to cases where nothing remained to be done but the mere formality of transfer in order to perfect what was intended to be an immediate gift *inter vivos*. There was no room for the application of the principle where there was an intention to give which was not completed, because the intending donor desired first to apply the subject matter of the gift to some other purpose. In such a case, the intended donee when appointed executor could not say that nothing remained to complete his gift but the transfer, because, had he asked the donor to transfer the property, the donor's answer would have been that it was his intention to give the property to the donee after he had used it for a prior purpose. Such a state of affairs necessarily excluded the doctrine in *Strong v. Bird*, *supra*.

Decision of Danckwerts J. reversed.

The headnote in *In re Stewart* [1908] 2 Ch. 251 considered and explained.

In re Innes [1910] 1 Ch. 188 and *In re Pink* [1912] 2 Ch. 528 followed.

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APPEAL from Danckwerts J.

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In the early spring of 1949 the testatrix, Mrs. Marion Eva Freeland, was the owner of a Hillman motor car which was then in her garage. The car had been immobilized during the war and was not then in a roadworthy condition. In February or March of that year the plaintiff, Hilda Jackson, who was a friend of the testatrix, went to see her and told her that the plaintiff's car had developed a leak.

The plaintiff gave the following evidence as to what took place at that interview: "When I told Mrs. Freeland, I said about the car and the condition it was in. She said: 'You must have my car.' (Q.) You told her your car was leaking? (A.) Yes. (Q.) What else did you say? (A.) That 'I could not use it as it is with the water coming through,' and she said: 'You must have my car.' I said I would buy it from her, but she said: 'No, dear; I will give it to you.' (Q.) What happened? (A.) When we discussed about giving me the car, I said 'About when could I have it?', and she said she would let me have it as soon as she could, but it was immobile. . . . (Q.) She said 'it was immobile? (A.) Yes. Of course, I knew that. She said she would let me have it as soon as she could get it on to the road.'"

No further steps were then taken by the testatrix in regard to the car. Two or three months later the defendant, Mrs. May Howard Rodgers, called to see the testatrix and told her that her own car, which she used for her work, had broken down and asked the testatrix for permission to use her Hillman motor car. The testatrix then tried to get in touch with the plaintiff on the telephone. Having failed to do so, the testatrix wrote to the plaintiff a letter dated May 5, 1949, in the following terms: "Dearest Mrs. Jackson, We have been hoping for a line, and phoned several times, but expect you perhaps are in town. I wanted to tell you about the car and would have come if I could but would have been so sorry to miss you. To put it quickly Mrs. Rodgers' car, I am sure you will not be surprised to hear, has gone to pieces, and she cannot get another for the moment and she cannot get on with her job without one, and wants mine, and will put it in commission if I will let her have it for the time, say three or six months, but I am not thinking for one instant of selling it so I hope you will not think I am going back on my word if you really thought you would like to have it—I would like so much to see you and explain how she

"is placed over the matter. Do let me know if you could come over one day. . . ."

The testatrix subsequently had the car put into running order and it was handed to the defendant, who used it and retained possession of it until the death of the testatrix. All the formalities on the loan of the car to the defendant in connexion with the insurance and registration were carried out by the testatrix on the footing that she was the owner. There was, however, the evidence of an independent witness, a Mrs. Jones, that the testatrix had referred to the car as the plaintiff's car.

The testatrix appointed the defendant and the plaintiff to be the executrices of her will dated June 30, 1949. She died on April 8, 1950, and her will was on July 12, 1950, duly proved by the defendant and the plaintiff.

The plaintiff requested the defendant to deliver the Hillman motor car to her, which the defendant refused to do. Thereupon the plaintiff started this action in which she claimed a declaration that she was the owner of the motor car and an order for its delivery to her.

Danckwerts J. held that the imperfect gift made in the spring of 1949 by the testatrix to the plaintiff had, under the principle laid down in *Strong v. Bird*,¹ been perfected by her appointment as executrix, and he made an order for the delivery of the motor-car to the plaintiff. The judge based his judgment almost exclusively upon the letter of May 5, 1949, which the testatrix wrote to the plaintiff.

The defendant appealed.

John Bowyer for the defendant. The principle laid down in *Strong v. Bird*¹ that an imperfect gift is perfected by the donee's appointment as the donor's executor only applies where there was an out and out gift in the first instance, which failed for some legal technicality. Further, for the principle to apply the intention to give must continue until the donor's death. Here the evidence establishes that there was no such continuing intention to give which subsisted down to the death of the testatrix.

Nigel Warren for the plaintiff. The authorities relied on below were *Strong v. Bird*¹ and *In re Stewart*,² and also *In re Innes*,³ which it was suggested should be regarded as a gloss on *Strong v. Bird*.¹ *In re Stewart*² was commented on by Kennedy L.J. in *In re Pink*.⁴ It is clear that what is contemplated in *Strong*

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¹ (1874) L.R. 18 Eq. 315.

² [1908] 2 Ch. 251.

³ [1910] 1 Ch. 188.

⁴ [1912] 2 Ch. 528, 538.

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*v. Bird*⁵ and *In re Stewart*⁶ is a continuing intention to give. There was here an animus donandi which continued until the testatrix's death. It is contended that there is here strong evidence of a continuing intention to give. It is submitted that Danckwerts J. reached a right conclusion on the evidence. All the relevant authorities were cited to him and he found the testatrix had an intention to make a gift of the car during the whole of the relevant period.

John Bowyer in reply. It is not sufficient for the plaintiff to show that the evidence is consistent both with an immediate intention on the part of the testatrix to make an out-and-out absolute gift and with a promise to make a gift in the future. It is submitted: first, that the testatrix never intended to make an absolute gift; secondly, that, if she ever had such an intention, it did not continue down to her death. When she lent the car to the defendant her intention changed to an intention to give in the future.

EVERSHED M.R. The contest in these proceedings has arisen from the amiability of the testatrix, a Mrs. Freeland, towards the two ladies who are the parties to the suit, whom, by what is perhaps a strange irony, she appointed as her two executrices, and each of whom has laid claim, by gift or otherwise, to a specific chattel, namely, a Hillman motor car.

The testatrix died in April, 1950, and the transactions with which we are concerned took place in the spring of 1949. The plaintiff's allegation is that in that spring the testatrix gave to her the Hillman motor car, that is to say, "gave" it in the popular sense of the term, meaning to make then and there a gift of it, such gift being, however, in the eye of the law imperfect, because it was not accompanied by actual manual delivery or its equivalent; and the plaintiff says that that imperfection is, by reason of the so-called rule in *Strong v. Bird*,⁵ cured by the circumstance that the plaintiff was appointed personal representative of the testatrix.

The judge found in favour of the plaintiff. He held that an imperfect gift made in the spring of 1949 was perfected by the plaintiff's appointment as executrix, and the main part of the case before us has concentrated on that matter. Mr. Bowyer has argued that the judgment is incorrect in that conclusion, and based on a misapprehension either of the law applicable, or of the true inference to be drawn from the facts, or both.

⁵ L.R. 18 Eq. 315.

⁶ [1908] 2 Ch. 251.

I have found the case exceedingly difficult, and although I have come to the conclusion that the judge did not misdirect himself in the matter of law, I think there is no doubt—and Mr. Warren has barely contended the contrary—that in relying, as he did, upon a particular letter the judge has exposed himself to serious challenge.

Although before us there has been no question as to the law applicable, it may, I think, be useful to refer to it, because the headnote to *In re Stewart*,⁶ unless examined in the light of the whole judgment, is liable somewhat to mislead.

The bare and simple proposition which is associated with the case of *Strong v. Bird*,⁵ namely, that an imperfect gift may be perfected by the subsequent appointment of the donee as personal representative, disguises an important distinction. In the headnote to the case of *In re Stewart*⁶ the principle is stated thus: "The principle laid down by Jessel M.R. in *Strong v. Bird*⁵—" that where a testator has expressed in his lifetime an intention "to give personal estate belonging to him to one who becomes "his executor, the intention to give continuing, the donee is "entitled to hold the property for his own benefit—is not confined "to the release of a debt; and it is immaterial whether the donee "is the only executor or one of several."

That summary of the decision of Jessel M.R. seems to me to be equivocal; for the words "an intention to give" may mean either one of two things: they may mean an intention of giving, that is to say, an intention to do that which at the time of doing it was meant to be a gift out and out; or they may mean an intention to make a gift in the future, which is in effect a promise, not enforceable in the eyes of the law, to make a gift thereafter.

I am quite satisfied that the doctrine enunciated in *Strong v. Bird*⁵ does not apply to the latter of the two types of case. There must, for the application of this doctrine, be an intention of giving, as distinct from an intention to give. That was made clear by Parker J. in the case of *In re Innes*.⁷ The claim in *In re Innes*⁷ was of this nature: a father was alleged to have said to his daughter that, since she had looked after him, she should have a certain income, and in addition the interest or dividends in respect of certain shares.

The relevant part of the judge's judgment was this⁸: "It "is attempted here to extend the doctrine of those cases still

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⁵ L.R. 18 Eq. 315.⁶ [1908] 2 Ch. 251.⁷ [1910] 1 Ch. 188.⁸ *Ibid.* 193.

C. A. "further."—That is a reference to the cases of *Strong v. Bird*⁹
 1951 and *In re Stewart*.¹⁰ "In the first place it is attempted to
 extend it to what, if there was a gift at all, was a gift of money
 without that money being identified, or sufficiently identified
 to enable it to be separated from the rest of the estate of the
 testator; and in the second place it is attempted to extend the
 principle of the earlier cases not only to an actual attempted
 gift which as a matter of fact is imperfect, and therefore will
 not take effect unless it is subsequently perfected, but to a
 mere promise to give on a future occasion.

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"In my opinion the principle of *Strong v. Bird*⁹ and *In re Stewart*¹⁰ and other similar cases ought not to be so extended. What is wanted in order to make that principle applicable is certain definite property which a donor has attempted to give to a donee, but has not succeeded. There must be in every case a present intention of giving, the gift being imperfect for some reason at law, and then a subsequent perfection of that gift by the appointment of the donee to be executor of the donor, so that he takes the legal estate by virtue of the executorship conferred upon him.

"It seems to me that it would be exceedingly dangerous to try to give effect by the appointment of an executor to what is at most an announcement of what a man intends to do in the future, and is not intended by him as a gift in the present which though failing on technical considerations may be subsequently perfected."

We have been referred to the case which is the founding authority, *Strong v. Bird*,⁹ and I am left in no doubt that the distinction to which Parker J. alludes is well founded, and that Jessel M.R. did not intend to make the doctrine apply to a case where there was a mere intention to give at a future time. Mr. Warren referred us to a passage from the judgment of Kennedy L.J. in a still later case, *In re Pink*,¹¹ where the Lord Justice said: "It is quite clear that what is spoken of both in the headnote in *Strong v. Bird*,⁹ and also in *In re Stewart*,¹⁰ as a continuing intention on the part of the testator, or the testatrix as the case may be, means a continuing intention that the gift should have been given at the time when it was given."

I have referred to that matter, because it is of some importance, and I think it may be that the headnote in the case of *In re Stewart*,¹⁰ if read hastily, would be liable to mislead or disappoint;

⁹ L.R. 18 Eq. 315.

¹⁰ [1908] 2 Ch. 251.

¹¹ [1912] 2 Ch. 528, 538.

but there is no question between the counsel in this case that the right principle is as I have stated it. Although I was at first inclined to think (because the judge had particularly picked out the headnote in *In re Stewart*¹² and certain other passages in the judgment of Neville J.) that he might himself have omitted to bear clearly in mind the distinction, on further examination I think that he did clearly have in mind the right principle. I would only add that no point has been taken in the present case, and I am not to be thought to be suggesting that it could be taken, that the principle is not as applicable to a chattel like a motor car as it was to the bearer bonds in *In re Stewart*¹² and the debt in the case of *Strong v. Bird*¹³ itself.

The question, then, is whether it is established that the testatrix, at the relevant date, intended to make an absolute gift to the plaintiff of this motor car, a gift which was only imperfect in the eye of the law because of the technicality of the absence of the transfer of possession, manual delivery or its equivalent, which the law requires to perfect such a gift. That matter is dealt with by the judge in this way: After citing the cases he did not allude in terms to the actual evidence given, even by the plaintiff, but based himself almost exclusively upon a letter of May 5, 1949. He formed the view that that letter, properly construed, was consistent and consistent only with the case put by the plaintiff, namely, an intended absolute gift in February or March, 1949.

It is necessary to start, in a case like this, by having clearly in mind the nature of the proceeding. In form it is an action between two hostile ladies. In truth it is an action by a claimant against the estate of a deceased person, that claimant being an executrix; and it is a trite observation, but nevertheless one which must not be forgotten, that a claimant in such a situation has a heavy onus to discharge; he or she must prove the case against his or her own estate, clearly and convincingly.

[His Lordship read the letter of May 5, 1949, and continued:] It seems to me that that letter is consistent only with this, that the testatrix is saying: "I know I have promised that I would "give you this car, but Mrs. Rodger is in a difficulty, and I have "promised to let her have it, only for a short time. Do not think "I am going to sell it" (although, of course, by inference she herself is saying that she had the right to sell it) "and do not "think I am going back on my word"—that is to say, "Do not

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¹² [1908] 2 Ch. 257.¹³ L.R. 18 Eq. 315.

C. A. "think I am going to break my promise to give it to you if you
1951 "want to have it." It is all in the future.

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It may be that you could have a case in which a gift might be absolute, though immediate possession by the donee might be postponed. I need not discuss to what extent the two conceptions are possible as a matter of broad general theory, but *prima facie*, if I make an absolute gift, or purport to do so, of some chattel, and then assert a right to use it, not merely to keep it for custody, but to use it for such purposes as I think fit, on such terms as I think fit, and for such time as I think fit, it seems to me that the assertion of that right is not consistent with an absolute gift, though it may well be consistent with a promise to give at some future date. A person of sensibility and honour would feel that if he or she had made a promise to give something in the future, his or her right to use the article in the meantime would be subject to serious qualification.

[His Lordship reviewed the evidence and held that the plaintiff had failed to make good her claim to the motor-car.]

JENKINS L.J. I agree. In order to succeed in this case the plaintiff had to prove that there was on the part of the testatrix a present intention to make an immediate gift to her, the plaintiff, of the motor car in question, and that that intention survived until the date of the testatrix's death.

I have no desire to multiply citations, but I might perhaps be allowed to refer to the observations of Farwell L.J. in the case of *In re Pink*,¹⁴ from which my Lord has cited an observation of Kennedy L.J. Farwell L.J. says this: "Since *Strong v. Bird*¹⁵ we must regard the matter in the light given us by that decision. It is plain that a mere intention to give, not carried out during the lifetime, will not do, because that would in effect be to allow a man to dispose after his death of his property by a document not testamentary. It is plain also that a mere intention to give is not enough, because you want an immediate gift. If there is an immediate gift, then the resulting trust for the benefit of the beneficiaries is rebutted."

The judge, having heard the witnesses and having formed his own view of their credibility, held that the plaintiff had satisfied the requirements for the application of the rule in *Strong v. Bird*,¹³ and had made out her title to the motor car accordingly. It is with hesitation that I have arrived at a different conclusion.

¹⁴ [1912] 2 Ch. 528, 536.

¹⁵ L.R. 18 Eq. 315.

So far as the judge's decision turned on his view of the oral evidence after he had had the advantage of hearing and seeing the witnesses, it would, of course, be wrong for this court to differ from him. But, accepting as substantially accurate the witnesses' version of what passed at the interviews of February or March, 1949, and of May in the same year, and accepting also the evidence as to the admissions made by the testatrix to the effect that the car was the plaintiff's car, the question still remains: Does that evidence, read in conjunction with the documentary evidence afforded by the letter of May 5, 1949, and considered also in conjunction with what actually happened, and with what passed between the testatrix and the insurance company in relation to the lending of the car to the defendant, suffice to establish the plaintiff's claim?

The foundation of the plaintiff's case is the interview in February or March, 1949, and, accepting to the full her version of what passed between herself and the testatrix at that interview, I confess that I regard the conversation as reported by her as being equivocal on the vital question to be decided.

When the plaintiff told the testatrix that her own car was leaking, the testatrix said: "You must have my car." The plaintiff said that she would buy it from the testatrix, and she said: "No, dear, I will give it to you"; and there was this further conversation: "When we discussed about giving me the 'car I'—that is the plaintiff—" said: 'About when could I 'have it?', and she said she would let me have it as soon as 'she could, but it was immobile. . . . (Q.) She said it was 'immobile? (A.) Yes. Of course, I knew that. She said then 'she would let me have it as soon as she could get it on to the 'road. (Q.) Anything further about that? (A.) No.'" Then the plaintiff said: "Of course, I said I would pay the expenses." Then, asked whether the testatrix agreed to that or said anything about it, she said: "Well, I just think that was left open, 'because we had got to go into it and have the car ready for 'road use."

It seems to me that this conversation as reported by the plaintiff, accepting her evidence as wholly accurate, is consistent with a promise by the testatrix to give the car to the plaintiff when the car had been put into running order, and if that were the true construction of this conversation it would not, in my view, suffice to satisfy the requirements for the application of the rule in *Strong v. Bird*.¹⁵

¹⁵ L.R. 18 Eq. 315.

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Be that as it may, the matter did not rest there, for the next relevant circumstance was the letter to the plaintiff of May 5, 1949. As my Lord has said, the judge regarded that letter as supporting the plaintiff's claim, on the ground that she would not have been concerned at all, and would have had no claim to be consulted on the question of the loan of the car to the defendant, if there had not been something in the nature of a gift of the car by the testatrix to the plaintiff.

With respect to the judge, it seems to me that the plaintiff would equally have had a claim to be consulted, whether what had passed had amounted to an immediate but imperfect gift, or whether it had amounted merely to a promise to give at a future time; and the terms of the letter are, in my opinion, wholly inconsistent with the view that the testatrix, when she wrote it, considered herself as having actually made an immediate gift of the car to the plaintiff, complete in all respects apart from the legal formality of delivery. On the other hand, the terms of the letter seem to me to be wholly consistent with the view that the testatrix, realizing that she had promised to make a gift of the car to the plaintiff when it could be got on the road again, thought herself in honour bound to consult the plaintiff before she lent the car to the defendant.

The plaintiff saw the testatrix after she received that letter, and it is to be observed that the plaintiff did not in her evidence purport to give any of the actual words used by the testatrix on this occasion. The plaintiff said in her evidence: "I said I was "quite willing to lend it"—that is, the car—"to her"—that is, to the defendant—"because I really thought she would take care "of it and use it as a sacred trust." A little later she said: "The car was mine, and it was a question whether I would let "it be lent to her for the time being until she got a new car." Then, again, she was asked: "So far as you were concerned, after "the conversation had ended you realized that the car was going "to be loaned with your consent to the defendant? (A.) Yes; "that is the truth." The plaintiff was there giving, no doubt with perfect honesty, her idea of the upshot of the arrangement, but not purporting to repeat verbatim what the testatrix had actually said.

Following on the letter of May 5 and the interview, the car was put in running order, and it was lent to the defendant, and all the formalities in connexion with that loan, with the insurance company and with regard to the registration, were dealt with on

the footing that the testatrix, as owner, was lending the car to the defendant. The defendant retained possession of the car, and was still in possession of it on the date of the death of the testatrix on April 8, 1950.

I have not overlooked the evidence of Mrs. Jones in regard to the statements made by the testatrix to the effect that the car was already the plaintiff's car, but I think her evidence related for the most part to the period before the writing of the letter of May 5, 1949, and, so far as it does so relate, it has no bearing on the testatrix's view as to the effect of the subsequent loan transaction. Whilst it is true to say that it is not direct evidence of the transaction itself, but of admissions by the testatrix made *ex post facto*, it is certainly evidence tending to support the plaintiff's case. I do not, however, think that Mrs. Jones's evidence suffices to displace what seems to me to be the inevitable conclusion on the other material available in the matter.

In my view, the lending of the car to the defendant, albeit with the consent of the plaintiff, is really fatal to the plaintiff's claim that there was a continuing intention to make an immediate gift. In my judgment the principle of *Strong v. Bird*¹⁵ is directed to perfecting gifts complete in all respects, except as regards the legal formalities necessary for the proper transfer of title to the particular property in question. It is confined, in my view, to cases where nothing remains to be done but the mere formality of transfer, in order to perfect what was intended by the testator or testatrix to be an immediate gift, *inter vivos*, and surely there can be no room for its application in a case where there is an intention to give, but the gift is not completed because the intending donor desires first of all to apply the subject-matter of the contemplated or promised gift to some other purpose.

In that case the intended donee, when appointed as executor, cannot say: "Nothing remained to complete my title except the 'transfer,' or in other words, 'If the testator had been alive today, and I had asked him for a transfer, he would have made it at once without question,' for in such circumstances the testator's answer would have been: 'I will not transfer the property to you now. My intention is to give it to you after 'I have used it for the prior purpose I have in view,' and that state of affairs seems to me necessarily to exclude the application of the principle of *Strong v. Bird*.¹⁵

Furthermore, I think the manner in which the car was lent to

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¹⁵ L.R. 18 Eq. 315.

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the defendant is really quite incompatible with the view that the testatrix had already made an immediate gift, with nothing at all remaining to be done but the bare formality of delivery, the conclusion seems to me to be irresistible, that the testatrix, instead of herself lending the car to the defendant, would have transferred it to the donee, the plaintiff, with the request that she should lend it to the defendant. The circumstance that the transaction was carried out in the way in which it was carried out, seems to me to be a strong indication that the testatrix, intending to let the defendant have the use of the car until such time as her own was repaired, thought it expedient herself to retain the ownership and control of the car until such time as the defendant had finished with it, albeit persisting in her intention to give the car to the plaintiff at a future date, namely, on such date as the defendant no longer needed it.

Accordingly, for the reasons I have endeavoured to express, as well as those stated by my Lord, I agree that this appeal should be allowed.

MORRIS L.J. I have arrived, though not without some moments of hesitation, at the same conclusion. I think that in a case of this kind it must be remembered that witnesses giving evidence in 1951 of conversations that took place in 1949, even though they are witnesses of probity, cannot be expected to be able to recall with precision the exact words that were used. I think, further, in this case, that there is much force in the submission made by Mr. Bowyer that a good deal of the evidence to which our attention has been closely directed may be regarded as consistent with the submissions either of the defendant or of the plaintiff.

The argument of Mr. Bowyer was that when the evidence is examined, it only shows a declaration on the part of the testatrix of an intention that she would give at a future time. Mr. Warren's argument was that the evidence supported the conclusion that in February or March of 1949 there was a gift by the testatrix, which was only imperfect for the reason that there was no delivery of the chattel, and nothing equivalent to delivery of the chattel.

Mr. Warren's argument further was that what happened thereafter might be viewed in this light: he said that the original arrangement, at the time when there was an out-and-out gift, though imperfect, was that possession was temporarily to be retained by the testatrix, and that thereafter the time for yielding

up possession was postponed, with the permission of the plaintiff, and that further, with the permission of the plaintiff, it was arranged that there should be user for a temporary period by another lady, namely, the defendant.

Speaking for myself, I feel that that is quite a possible position, assuming that the evidence supports and warrants the first conclusion, namely, that there was an out-and-out gift by the testatrix to the plaintiff, but a gift incomplete for lack of delivery or its equivalent.

I have come to the conclusion that when all the answers in the oral evidence are analysed, the plaintiff did not discharge the onus which was upon her of showing that there was an out-and-out gift, though incomplete for the reason stated. I only want to indicate, as briefly as I can, the reasons which have led me to that conclusion, and I think it will be sufficient if I summarize them.

In the first place, I think the circumstances as to the arrangement made between the testatrix and the plaintiff tend rather to the view that there was a declaration of an intention to give in the future. I think those indications are given by the circumstance that the car remained with the testatrix; further, by the circumstance that it apparently remained for a period of some weeks, as my Lord the Master of the Rolls has pointed out; further, that the arrangements in regard to repairs rather tend to the same conclusion. The question was asked of the plaintiff "Did she agree to that?"—that is in regard to the expense of putting the car on the road—"Did she agree to that or say anything about it?" and the answer was: "Well, I just think that" was left open because we had got to go into it and have the car "ready for road use." That is a further indication, in my view, that what happened was that there was a statement by the testatrix of her intention to make a gift in the future. Further, I am in entire agreement with all that my Lords have said in regard to the letter of May 5, and I think in particular the phrase "But I am not thinking for one instant of selling it" is a phrase that supports Mr. Bowyer's argument; and further, the phrase, "So I hope you will not think I am going back on my word if" "you really thought you would like to have it," is a phrase also, in my judgment, which supports Mr. Bowyer's view. Other expressions in this letter are rather neutral, and are capable of explanation in the way that Mr. Warren has explained them.

Speaking for myself, I do not find so much assistance from the fact that the testatrix continued to deal with the insurers, but

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those indications to which I have briefly referred lead me to the view that the transaction in the first place was that the testatrix said that she would give the car to the plaintiff after some repairs had been done, and at a later date said that she would give the car to the plaintiff after the defendant had had a period of user of it.

I have therefore come to the conclusion that the plaintiff failed to establish her case, and I am therefore in agreement that the appeal should be allowed.

Appeal allowed.

Solicitors: *Beaumont, Son & Ridgen; Gardiner (Gordon), Carpenter & Co., for F. H. Carpenter & Oldham, Brighton.*

B. A. B.

HARMAN J. HEAD (HENRY) & CO. LD. v. ROPNER HOLDINGS LD.

1951

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[1951 H. 1080.]

Companies—Amalgamation under holding company of two companies having unequal assets—Issue of shares by holding company—Adjustment of inequality—Balance sheet—Application of premiums—Share premium account—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 56.

In 1948, a holding company was incorporated to acquire, for amalgamation purposes, two shipping companies formerly carried on under the same management. The assets of these two companies were of slightly unequal value. There was issued in the aggregate to the shareholders in these two companies the entire authorized capital of the amalgamated company, which was £1,759,606. The real value of the shares at par was £5,066,506 in excess of that sum. The balance sheet of the holding company showed that this sum of £5,066,506 was appropriated to the credit of "Capital Reserve—Share Premium Account":—

Held, that this was a proper appropriation, the transaction being within the provisions of section 56 of the Companies Act, 1948.

MOTION (treated as the trial of the action).

The material facts are fully set out in the judgment.

The plaintiffs, Henry Head & Co. Ltd., sought an injunction restraining the defendants, Ropner Holdings Ltd., from retaining £5,066,506, standing to the credit of "Capital Reserve—Share Premium Account" in the books and accounts of the defendant

company as a sum credited therein to share premium account, or from treating any part thereof (in the books or accounts or otherwise) as representing the aggregate amount or value of premium on shares to which s. 56 of the Companies Act, 1948,¹ applies, or from treating that sum otherwise than as constituting a general reserve of the defendant company.

Charles Russell K.C. and *Cecil W. Turner* for the plaintiff company. The holding company had, at the time of the amalgamation, no assets and no shares to which any value could be attached. There was therefore nothing to which this premium could be added. It was not the intention of the legislature to extend, under this section, the meaning of the word "premium." No definition can be found showing that the word "premium" included this kind of transaction.

Geoffrey Cross K.C. and *Ian G. H. Campbell* for the defendant, the holding company. The holding company has taken the proper course in making this appropriation. The use of the word "premium" in section 56 is not confined to a cash payment. [Counsel referred to *Drown v. Gaumont-British Picture Corporation Ltd.*²]

Russell K.C. replied.

HARMAN J. The defendant company is what is popularly known as a holding company and was incorporated at the end of 1948, having as its first and paramount object the acquisition for amalgamation purposes of two shipping companies formerly carried on separately under the same management. The amalgamation was of the simplest kind. The shareholders in the two companies were willing to sell their shares in the two companies in exchange for shares in the holding company. At that point there arose the question of the rate of capitalization. Sometimes this figure is a merely nominal figure; at other times it is designed to reflect the true value of the assets being acquired. In the present case a valuation of the assets of the two companies was procured from a firm of accountants. No

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¹ Companies Act, 1948, s. 56:
" (1) Where a company issues shares
" at a premium, whether for cash or
" otherwise, a sum equal to the
" aggregate amount or value of the
" premiums on those shares shall be
" transferred to an account, to be
" called 'the share premium account,'

" and the provisions of this Act re-
" lating to the reduction of the share
" capital of a company shall, except
" as provided in this section, apply as
" if the share premium account were
" paid up share capital of the com-
" pany."

² [1937] Ch. 402

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doubt those calculations were based on information given by persons having a knowledge of shipping, a knowledge which accountants would not have, and they merely valued the physical assets of the two companies, leaving out questions of profit-earning capacity, goodwill and so forth. They then apparently arrived at a value of the assets of each of the constituent companies and advised that the one having slightly larger assets than the other should issue by way of capital profit dividend a sufficient sum to its shareholders to reduce the value of the assets to an equality with the other company.

At that point it was possible to advise, and the advice was given, that a pound-for-pound capitalization—that is to say, a pound of the new company's shares for a pound's worth, nominal, of the constituent company's shares—was a fair method of performing the amalgamation. Accordingly, there was issued in the aggregate to the shareholders in the two companies the entire authorized capital of the holding company, which was £1,759,606. That did not, however, do anything more than represent the aggregate of the nominal value of the shares of the constituent companies. The real value of the shares was, if the valuation was right, approximately £5,000,000 in excess of that sum. The issuing company has therefore acquired for its shares assets worth between six and seven millions, if that valuation be, as I think I must suppose it to be for these purposes, a true reflection of the value of the assets acquired at the time of their acquisition. When the balance sheet of the holding company appears for the year ended March 31, 1949, one finds on the left-hand side the issued capital set out, and below that, under the words "Capital Reserve, Share Premium Account (less formation expenses)," rather over £5,000,000. On the other side is stated the value of the shares in the subsidiary companies as valued in the way I have mentioned, and they are valued at rather under £7,000,000. When the consolidated balance sheet is looked at, a rather more express statement is found, namely: "Share Premium Account, being the excess of the value of the net assets of subsidiary companies at the date of acquisition over the book value of the investments (less formation expenses)"; and that is what this £5,000,000 figure is.

The directors have been advised that they are bound to show their accounts in that way, and, not only they, but the plaintiffs, who are large shareholders, regard that as a very undesirable thing, because it fixes an unfortunate kind of rigidity on the structure of the company, having regard to the fact that an

account kept under that name, namely, the Share Premium Account, can only have anything paid out of it by means of a transaction analogous to a reduction of capital. It is, in effect, as if the company had originally been capitalized at approximately £7,000,000 instead of £1,750,000.

The question which I have to determine is whether the defendants were obliged to keep their accounts in that way. That depends purely on section 56 of the Companies Act, 1948, which is a new departure in legislation and was, it is said, intended to make compulsory that which had long seemed to be desirable, namely, the practice of putting aside as a reserve and treating in the ordinary way as capital cash premiums received on the issue of shares at a premium. The attention of the public and the legislature was, perhaps, drawn to this by cases such as *Drown v. Gaumont-British Picture Corporation Ltd.*,³ where the defendant corporation, notwithstanding that it was making very large trading losses, paid out by way of dividend a large sum, principally drawn from a share premium account. Clauson J. held that there was nothing against that in law.

Section 56 set out to remedy that omission in these words: [His Lordship read subsection (1).] Consequently, the share premium account can be distributed in the same restricted way and with the same leave of the court as if paid up share capital was being returned to the shareholders.

Counsel for the plaintiff company asks who would suppose that a common type of transaction of the sort now under consideration was the issue of shares at a premium and says that nobody in the city or in the commercial world would dream of so describing it. It is with a sense of shock at first that one hears that this transaction was the issue of shares at a premium. Everybody, I suppose, who hears those words thinks of a company which, being in a strong trading position, wants further capital and puts forward its shares for the subscription of the public at such a price as the market in those shares justifies, whatever it may be, 30s. a £1 share, £5 a £1 share, or any price obtainable; and the 10s. or £4 above the nominal value of a share which it acquires as a result of that transaction is no doubt a premium. That is what is ordinarily meant by the issue of shares at a premium. The first words of subsection (1) are: "Where a company issues shares at a premium." If the words had stopped there, one

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³ [1937] Ch. 402.

HARMAN J. might have said that the subsection merely refers to cash transactions of that sort, but it goes on to say "whether for cash or otherwise."

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What "otherwise" can there be? It must be a consideration other than cash, namely, goods or assets of some physical sort. Continuing, the subsection contains the words "a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called 'the share premium account'". Apparently, if the shares are issued for a consideration other than cash and the value of the assets acquired is more than the nominal value of the shares issued, you have issued shares at a premium; and I think that counsel for the plaintiff company was constrained to admit that, in the ordinary case, that was so. This subsection at least has that much result; but he says that the line must be drawn somewhere. It cannot apply, he says, where the issuing company has no assets at all other than the assets which it will acquire as the price of the issue of shares. "Premium" (he argues) means something resulting from the excess value of its already existing assets over the nominal value of its shares. I am much attracted by that. I have every desire to reduce the effect of this section to what I cannot help thinking would be more reasonable limits, but I do not see my way to limiting it in that way. It is not stated to be a section which only applies after the company has been in existence a year, or after the company has acquired assets, or when the company is a going concern, or which does not apply on the occasion of a holding company buying shares on an amalgamation. Whether that is an oversight on the part of the legislature, or whether it was intended to produce the effect it seems to have produced, it is not for me to speculate. All I can say is that this transaction seems to me to come within the words of the section, and I do not see my way to holding as a matter of construction that it is outside it. If that is so, the inevitable result is that the action must fail.

Declaration accordingly.

Solicitors: *Sinclair, Roche & Temperley, for Temperley, Tilly & Hayward, West Hartlepool, for both parties.*

J. L. D.

In re LYONS. BARCLAYS BANK LD. *v.* LYONS.

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[1951 L. 441.]

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9, 12;
Dec. 3.

Will—Annuity payable by trustees “free of income tax”—Recovery by annuitant of tax paid in respect of annuity by reason of business losses—Annuitant’s liability to account to trustees—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 34.

Evershed M.R.,
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A testator, by his will, gave an annuity free of income tax, and the annuitant obtained relief under section 34 of the Income Tax Act, 1918, by way of repayment of the whole of the sums paid in tax in respect of his annuity in the financial years 1946-47, 1947-48, by reason of business losses sustained by him in those years.

On a summons taken out by the trustees to have determined whether the annuitant was accountable to them for the sums recovered:—

Held, that the annuitant was not entitled to retain for his own benefit any sums recovered by way of tax repayments made in respect of his annuity, in years in which it was found that no tax on the annuity was ultimately payable, and that the residuary estate of the testator was entitled to the whole of the sums so recovered.

In re Pettit [1922] 2 Ch. 765 applied.

Semble that an annuitant to whom an annuity is given free of tax who suffers business losses is a trustee not only of the sums he may recover in respect of income tax on account of such losses under section 34 of the Income Tax Act, 1918, but he is also a trustee of the right to make the necessary claim. Such an annuitant making business losses may either claim repayment under section 34 of the Act of 1918 or he may carry forward his loss to his next year’s tax liability under section 33 of the Finance Act, 1926. The annuitant must exercise one of the two alternatives, it may be, however, that he can exercise whichever of the alternatives he prefers and that he need not exercise that which is the more advantageous to the trust estate out of which the annuity is paid.

In re Kingcome [1936] Ch. 566 considered and approved.

Decision of Romer J. [1951] Ch. 1093 affirmed.

APPEAL from Romer J.¹

The testator, Henry Lyons, by his will dated October 8, 1942, devised and bequeathed his residuary real and personal estate to his trustees on the usual trusts for sale and conversion, and directed them, after paying his funeral and testamentary expenses, death duties, debts and legacies, to invest the residue of the proceeds of sale. By cl. 12, he directed his trustees to stand possessed of his residuary estate and the income from it on trust

¹ [1951] Ch. 1093.

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to pay the sum of £10 each week free of income tax to his son during his life on protective trusts; and from and after the son's death on trust to pay the sum of £8 each week free of income tax to the son's wife during her life on protective trusts; and, subject to that, to stand possessed of the residuary estate on trust for all the children or child of the son who should attain the age of twenty-one years.

The testator died on March 25, 1946, and, as from his death, the trustees had paid the annuity out of income of the testator's estate which had borne income tax at the standard rate by deduction at source.

In each of the financial years 1946-47, 1947-48, the annuitant sustained substantial business losses in respect of which he claimed, and obtained, relief under section 34 of the Income Tax Act, 1918. In the year 1946-47 the son's taxable income was:—(a) annuity £945 9s. 1d. (being the gross annuity required to produce the net annuity of £10 a week for a year less tax at the standard rate of 9s. in the £); (b) wife's earned income £97; (c) other income £43 11s. 11d., making an aggregate income of £1,086 1s. In the year 1946-47 £425 9s. 1d. was paid as tax on the above gross annuity (the net annuity being paid out of dividends received by the trustees which had borne tax) and £4 10s. on a dividend which had not borne tax.

The Inland Revenue authorities repaid to the son the payments of tax above referred to, aggregating £429 19s. 1d. on a claim by him under section 34 of the Income Tax Act, 1918, in respect of a business loss for the year 1946-47 of £1,027.

In the year 1947-48 the son's taxable income was:—(a) annuity £963 12s., being the gross annuity required to produce the net annuity for fifty-three weeks; (b) wife's earned income £242 10s.; (c) other income £12 10s.; less £28 18s., bank interest, and £37 0s. 8d. taxed charges, leaving an aggregate income of £1,152 14s. 8d.

In the year 1947-48 £433 12s. 9d. was paid as tax on the above gross annuity, the tax being actually paid as in the preceding year, and £5 12s. 6d. tax on a dividend. The Inland Revenue authorities repaid to the son £422 11s. 11d., being those payments of tax aggregating £439 5s. 3d., less a certain sum of £16 13s. 4d., on a claim by the son under section 34 in respect of a business loss for that year of £1,152.

In those circumstances the trustees took out a summons to have determined whether the annuitant under the rule in *In re*

*Pettit*² was liable to account for and pay to the trustees in respect of his annuity, either in whole or in part, sums recovered by him in respect of allowances and reliefs for income tax for the financial years 1946-47, 1947-48, on claims made by him pursuant to section 34 of the Income Tax Act, 1918, in respect of business losses sustained by him in those years.

Romer J. held that the annuitant was not entitled to retain for his own benefit any sums recovered by him by way of tax repayments in respect of his annuity.³

The annuitant appealed.

J. H. Stamp for the annuitant. The principle laid down in *In re Pettit*² has no application where an annuitant recovers tax under section 34 of the Income Tax Act, 1918, by reason of the business losses which he has suffered. That principle only applies to the statutory allowances under section 40 of the Finance Act, 1927, which reduce the tax which the annuitant is liable to pay in the first instance. The tax relief given by section 34 of the Income Tax Act, 1918, is a wholly different type of relief, providing for repayment of tax actually payable. The decision in *In re Pettit*² only covers the ascertainment of the annuitant's liability to tax in the first instance. It is based on the assumption that there has been an overpayment of tax. It does not apply to a repayment under section 34. The right to claim repayment in respect of business losses or to carry forward such losses in exercise of the option conferred by section 33 of the Finance Act, 1926, is a right personal to the annuitant for the exercise of which he is not accountable to the trustees of the fund out of which the annuity is payable.

[He referred to *In re Jones*⁴; *Michelham's Trustees v. Inland Revenue Commissioners*⁵; *In re Kingcome*⁶; *In re Macleannan*⁷; *In re Hooper*⁸; *In re Tatham*⁹; *Inland Revenue Commissioners v. Cook*.¹⁰]

The mere payment to an annuitant of his annuity free of tax imposes on him a fiduciary duty to obtain repayment of any tax which he may be entitled to recover in respect of the statutory allowances. No such duty rests on an annuitant who suffers a business loss to claim under section 34. He has an option to

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² [1922] 2 Ch. 765.

³ [1951] Ch. 1093.

⁴ [1933] Ch. 842.

⁵ (1930) 15 Tax Cas. 737.

⁶ [1936] Ch. 566.

⁷ [1939] Ch. 750.

⁸ [1944] Ch. 171.

⁹ [1945] Ch. 34.

¹⁰ [1946] A.C. 1.

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claim under section 34, but he is under no duty to do so. It is inconceivable that any testator should have intended that an annuitant who suffers a business loss should not have the benefit of section 34. A repayment under section 34 is outside the Schedules to the Income Tax Act, 1918. The annuitant's business loss should not result in a windfall for the testator's residuary legatees.

E. G. Wright for persons interested in residue. It is submitted that *Romer J.* reached a correct conclusion. Where an annuity is given free of tax the principle laid down in *In re Pettit*¹¹ applies and the additional sum given over and above the stated amount of the annuity is given for the purpose of enabling the annuitant to meet his ultimate liability to tax, if any. If he is under no liability to pay tax, he is not entitled to retain any sum paid in respect of tax. Tax relief under section 34 is in principle no different to the so-called statutory allowances. In construing the bequest of an annuity of £10 a week "free of "income tax," the latter words do not, as the annuitant contends, amount to a gift of the income tax. It has never been decided that the tax is the income of the annuitant for all purposes. It is contended that the gift of the tax was a gift for a limited purpose and, if the tax authorities refund the tax, the sum enures for the benefit of the estate and not of the annuitant. The sum returned goes in reduction of the annuity.

[*J. H. Stamp.* My contention is that the gift is made with the motive of paying tax, but, when once it is paid, the motive is immaterial, and it returns to the annuitant as part of the gift to him.]

It is something more than a gift made with a motive. The annuitant was entitled to be indemnified from the tax at all times and in all circumstances and that is all. [He referred to *Inland Revenue Commissioners v. Cook*¹²; *In re Williams*¹³ and *In re Arno*.¹⁴]

Relief under section 34 of the Income Tax Act, 1918, for business losses must be taken into account just as relief for any other loss is. Section 34 gives the right to repayment of part of the tax paid on an annuity. As regards other relief it is given before the tax is paid. There is, however, no real distinction in the form of relief given and there is no reason why the tax repaid should not be treated on the same footing as if less than the full tax was originally paid. The repaid tax on the annuity therefore

¹¹ [1922] 2 Ch. 765.

¹² [1946] A.C. 1.

¹³ [1945] Ch. 320.

¹⁴ [1947] Ch. 198.

belongs to the residuary estate. This accords with the rule in *In re Pettit*.¹⁵ The annuitant has the alternative of getting what would otherwise be repaid carried forward under section 33 of the Finance Act, 1926, and this would clearly enure for the benefit of the estate.

A. H. Droop for the plaintiff.

J. H. Stamp in reply.

Cur. adv. vult.

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Dec. 3, 1951. EVERSHERD M.R. read the judgment of the court:—The facts of the present case have been fully stated in his reserved judgment by Romer J.¹⁶ The question for determination is the extent of the accountability to the trustees of the estate of the testator, Henry Lyons (who died on March 25, 1946), of his son Michael, the appellant, in respect of repaid income tax. By the terms of cl. 12 of the testator's will, the trustees were directed out of his residuary estate "to pay the sum of £10 each "week free of income tax to . . . Michael during his life on "protective trusts. . . ."

The trustees of the will in proper execution of their duties paid to the annuitant during each of the first two years following his father's death the amount of his annuity out of income in their hands, after accounting to the Commissioners of Inland Revenue for income tax at the standard rate. But, during each of those years, the annuitant had suffered substantial business losses, and he accordingly made a claim pursuant to section 34 (1) of the Income Tax Act, 1918, for repayment of income tax paid by him or on his account. The question is whether and to what extent, having recovered such tax, he is now accountable to the trustees of his father's will for so much of the amount recovered as represents the tax paid in respect of his annuity.

The material figures for the two years are set out in Romer J.'s judgment. For present purposes it will suffice to refer to the figures for the first of the two years, the income tax year 1946–47; for in principle there is no difference between the two years.

In the year 1946–47 the annuitant's taxable income was, in all, £1,086 1s. Od., of which £945 9s. 1d. represented the gross annuity required to produce the net sum of £10 per week less tax at the standard rate of 9s. in the pound. In respect of that income the income tax paid was £429 19s. 1d., of which £425 9s. 1d. was the amount of tax paid by the trustees in respect

¹⁵ [1922] 2 Ch. 765.

¹⁶ [1951] Ch. 1093.

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of the annuitant's annuity. In the circumstances of his business loss the annuitant became entitled to recover, and did recover, the whole amount of £429 19s. 1d. of tax paid as above mentioned; and it was unnecessary to make any calculation of the sums he would, apart from his business loss, have been entitled to reclaim in respect of personal allowances and in respect of his children and life insurance premiums. In fact, however, these various allowances would have been equivalent, as we were told, to about one-half of the total tax paid by him, or on his behalf, and Mr. Stamp has conceded on the annuitant's behalf that, having regard to the decision in *In re Pettit*,¹⁷ and the cases which have followed that decision, the annuitant is liable to account to the trust estate for so much of the tax recovered as is equivalent to a due proportion (referable to the annuity) of what he would have been entitled to recover in respect of those allowances.

In the case of *In re Williams*,¹⁸ cited by the judge, Uthwatt J. drew attention to the logical and administrative difficulties which, as it seemed to him, and as Mr. Stamp had himself argued in the leading case of *In re Pettit*,¹⁷ might flow from the conclusion at which the court arrived in the last-named case. The present case may well afford an illustration of those difficulties. But since the decision of the House of Lords in *Inland Revenue Commissioners v. Cook*,¹⁹ all doubts have been laid at rest and all regrets rendered futile. It is now to be taken as well established that, in the case of an annuity comparable in form to that in *In re Pettit*,¹⁷ the annuitant is accountable to the trustees for what in the present case Romer J. has conveniently called "statutory allowances." But the first question must always remain: What did the testator mean to give? In the passage cited by Romer J. from *In re Williams*,¹⁸ Uthwatt J. noted the distinction between two classes of gift: first, where the reference to income tax is merely an indication of the arithmetical method whereby the amount of the gift is to be ascertained; and, second, where it appears that the testator's intention is to relieve his beneficiary of liability for income tax in respect of the benefit concerned so that (and this must be regarded as the main purpose of the gift) the beneficiary may have a clear sum of so much money in hand—to use Evershed J.'s phrase in the case of *In re Tatham*,²⁰ a clear sum of spending money, neither more nor less; or, as Lord Maugham expressed it in *Cook's case*,²¹ a

¹⁷ [1922] 2 Ch. 765.²⁰ [1945] Ch. 34.¹⁸ [1945] Ch. 320, 321.²¹ [1946] A.C. 1, 7.¹⁹ [1946] A.C. 1.

certain sum for his personal behoof. In the present case it has been conceded by Mr. Stamp that the annuity given must be regarded as of the second category above mentioned, the category in which fell *In re Pettit*²² itself. The question then is whether the sum of tax refunded to the annuitant is to be regarded as in pari materia with the statutory allowances so as to make him accountable for the whole sum received; or whether it is, as Mr. Stamp contends, something altogether distinct in character from the statutory allowances. We have examined all the cases that have been decided since *In re Pettit*,²² and it must, we think, be conceded that in none of them was the present case ever in the minds of the judges who decided them.

It would be possible to imagine an extreme case in which the Crown placed itself under an obligation to make a payment to some individual or class of individuals, in consideration, say, of services rendered to the State, equivalent to the whole or some part of the income tax which that individual, or class of individuals, had paid. In such a case, there would obviously be a strong case for asserting that the sum recovered was not in fact tax and did not in any way affect what had been the true liability for tax. Again, section 34 (1) of the Income Tax Act, 1918, might have been differently worded so as to make it appear that, in the circumstances in which the annuitant found himself, he was entitled to recover a sum equivalent to the whole or part of the tax for which he had been properly assessed. But the subsection is not so worded. The right of the annuitant, according to subsection (1), is to have "an adjustment of his liability" for tax in respect of the previous year's income. In the circumstances, the kernel of the matter, as it seems to us, is found in the single sentence of Romer J.'s judgment²³: "The question 'is not whether at any particular stage the annuitant was liable 'to tax, but whether he was ultimately liable. . .'" In our judgment, on a true analysis, in respect of the year in question, the annuitant became entitled to have his tax liability adjusted by reference, not only to his "statutory allowances," but also by reference to the fact of his business loss. In the end he was not liable for any tax at all. And, as we interpret the gift, the annuitant was no more entitled to keep what he recovered in respect of business loss than he was to keep his statutory allowances.

²² [1922] 2 Ch. 765.

²³ [1951] Ch. 1093, 1101.

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Mr. Stamp quarrelled somewhat with the judge's reference to a windfall.²⁴ And it is true that, in the circumstances, the persons entitled to residue, subject to the annuity, may well be said, if the judgment appealed from is right, to have had a windfall attributable to the purely extraneous circumstance that the annuitant incurred a business loss. Still, we cannot see in principle that it is any less a windfall for residue that the persons interested therein are entitled to recover a certain sum by reason of the fact that the annuitant has married or has had one or more children. And we agree with the reasoning of the judge.²⁵ It seems to us not to be in accordance with the intention of the testator that his estate should, in effect, provide a sum of money to make good to the annuitant a business loss. The obligation of the estate was, as we have said, on a true interpretation of the gift, to provide the annuitant with a certain sum of spending money, no more, no less.

But Mr. Stamp also argued that the sum paid out of residue in respect of the annuitant's income tax is no more than a gift for a particular purpose, and does not fail because the purpose for which it was made is not, or has not to be, fulfilled. It is true that (as the authorities have made clear) in the case of an annuity, such as the present, there is to be found a gift, first, of the amount of the net sum of the annuity, and, second, of the amount of tax properly exigible in respect of it. That result is achieved because it is not in law possible to make a gift of so much per annum "free of income tax." As Lord Maugham observed in *Cook's* case,²⁶ a benevolent construction must be given to the gift in order to save it from invalidity; and so it is construed as a gift (a) of the net sum, and (b) of the tax properly exigible in respect of it.

But the conclusion for which Mr. Stamp contends does not, in our judgment, follow from the premise. So to hold would be, as we think, to lose sight of the essential distinction to which Uthwatt J. drew attention in the passage from *In re Williams* ²⁷ to which we have already alluded; for it would then appear that the reference to income tax was not intended in order to achieve for the annuitant an indemnity against tax in respect of the annuity given and to allow the annuitant to receive neither more nor less than a clear net sum, but was in truth but an arithmetical factor in quantifying the amount of the gift. In our judgment, once it is determined that the effect of section 34 (1) of the Act

²⁴ [1951] Ch. 1093, 1097.

²⁵ *Ibid.* 1101.

²⁶ [1946] A.C. 1, 10.

²⁷ [1945] Ch. 320, 321.

of 1918 is to give to the annuitant a right to re-open his assessment and have his liability for tax in respect of all his income adjusted, then it must follow that the purpose of the testator will have been satisfied so long as any tax properly referable to the annuity, as ultimately ascertained, is discharged out of the estate and the net sum specified by the testator is left in the hands of the beneficiary.

At the end of his judgment Romer J.²⁸ referred to the question which had been raised before him: Assuming that residue was entitled to reclaim from the annuitant the sum of tax repaid, then, following the principles laid down by Bennett J. in *In re Kingcome*,²⁹ did it not follow that the annuitant must be a trustee, not merely of any sums in fact received and referable to the tax in respect of his annuity, but also a trustee of the right to make the necessary claim? And in the present case there is the complication that the taxpayer has an option: he may either claim repayment, that is, have his tax readjusted under section 34, or he may carry forward his loss to his next year's tax liability under section 33 of the Finance Act, 1926. Romer J. felt it unnecessary to give any answer to the question posed. We were somewhat troubled in the course of the argument by the point, for, if Mr. Stamp is wrong, it seems to us that it should follow that the annuitant was a trustee of whatever rights he had as distinct from anything he recovered in respect of them. In so stating, we are assuming that *In re Kingcome*²⁹ was rightly decided. No doubt has ever been raised in subsequent cases as to the correctness of the decision, and we see no reason to doubt it. If, therefore, it is necessary to give an answer to this question (as we are inclined to think it is) we should not shrink from holding that the annuitant was a trustee of his rights. Strictly, it may follow that he ought to exercise that one of the two alternatives available which was the more advantageous to the trust estate. We are not, however, satisfied that it is necessary to go to that length. It may well be that the annuitant would be entitled to exercise whichever of the alternatives he preferred—that matter being left to his discretion; but, if the annuitant declined to exercise either alternative, then, as it seems to us, the trustees could bring him before the court and obtain an order upon him to exercise either that one which was the more beneficial to the estate, or, at least, that one which he, the annuitant, preferred. It might well be possible that in respect of one or

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²⁸ [1951] Ch. 1093, 1102.²⁹ [1936] Ch. 566.

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more of the statutory allowances Parliament might hereafter give to the taxpayer an option to choose between one of two alternative ways of obtaining a particular benefit. And, if this came to pass, then the present problem would arise almost exactly in reference to that statutory allowance.

For the reasons to which we have given brief expression, out of compliment to Mr. Stamp's argument, we conclude that the judgment of Romer J. was correct, and we agree with and accept the reasoning on which that judgment was based. In our opinion the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Wright & Webb; Saville & Mannooch.*

B. A. B.

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Nov. 7, 8.

Evershed M.R.,
Jenkins and
Morris L.JJ.

In re LOVE (J. W.).

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[No. 612 of 1949.]

Bankruptcy—Judgment creditor—No notice of act of bankruptcy—Execution—Completion of execution by seizure and sale before making of receiving order—Application by trustee in bankruptcy for repayment of part of proceeds of sale—Refusal of application—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 37, 38, 40.

Section 40 (1) of the Bankruptcy Act, 1914, provides that "where a creditor has issued execution against the goods or lands of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . , against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor":—

Held, that when execution on the furniture of a debtor is levied and completed by sale in ignorance of an earlier act of bankruptcy and before the date of the receiving order and of the presentation of any bankruptcy petition, the trustee in bankruptcy cannot recover any part of the proceeds of sale applied in paying a creditor of the debtor.

This is so, although by section 37 (1) of the Act the bankruptcy of the debtor is to be deemed to relate back to the act of bankruptcy, and by section 38 (2) (a) the property of the bankrupt divisible

among his creditors is to comprise "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy."

In re O'Shea's Settlement [1895] 1 Ch. 325 and *Wild v. Southwood* [1897] 1 Q.B. 317 considered.

Decision of Danckwerts J. [1951] Ch. 952 affirmed.

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APPEAL from Danckwerts J.¹

On September 8, 1949, a debtor committed an act of bankruptcy by failing to comply with a bankruptcy notice. On November 11, 1949, a petition was presented. On December 14, 1949, a receiving order was made, and on January 5, 1950, the debtor was adjudicated a bankrupt. All these matters took place in the High Court.

On October 10, 1949, judgment had been entered at Kingston-on-Thames County Court for the Ministry of National Insurance against the debtor for £60 7s. 3d., being arrears of contributions due from the debtor. At the same time there was granted to the Minister a warrant of execution, the costs of the execution being £1 6s. 0d., making the total sum due £61 13s. 3d. On October 4, 1949, the debtor had been ordered to pay £10, the amount of fines imposed on him by the county court for contempt. On November 4, 1949, the registrar of the county court (who was also the high bailiff and so the officer in charge of executions) seized the debtor's household furniture under warrant of execution dated October 17, 1949. On November 15, 1949, he sold it for £101 15s. 0d., out of which he paid the judgment debt to the judgment creditor. By virtue of section 170 of the County Courts Act, 1934, he retained £10, the amount of the fines. There was throughout no knowledge of the earlier act of bankruptcy or of the proceedings commenced in respect of it. The Official Receiver having become the trustee in bankruptcy of the bankrupt, he asked the Minister to repay the sum of £61 13s. 3d., and this was done. He also asked the registrar to repay the sum of £10, but this was refused.

The Official Receiver therefore brought a motion asking for (1) a declaration that, at the date of the execution levied by the registrar on the bankrupt's purported goods and chattels, these goods and chattels were vested in him as trustee; (2) an order that the registrar should pay him the sum of £10 as being part of the proceeds of sale of the goods seized; and (3) the costs of the motion.

¹ [1951] Ch. 952.

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Danckwerts J. said that the trustee's claim was based on the relation back of the trustee's title by virtue of section 37 of the Bankruptcy Act, 1914, to the act of bankruptcy of September 8, 1949; but that on the terms of section 40 the claim of the registrar to retain the sum of £10 prevailed because the execution against the debtor's goods was completed by seizure and sale before the making of the receiving order. The official receiver appealed.

On the appeal the question was argued whether in any case the action lay against the registrar seeing that in collecting the fines he must be treated as acting on behalf of the Crown, but this question was not decided and that part of the argument is not therefore reported.

Muir Hunter for the trustee. It is submitted that it is not permissible to construe the terms of a current statute which are in themselves clear by considering the phases through which the sections passed in previous Acts before reaching their present form. If Parliament has altered the wording of a section it must have done so for a purpose. Parliament must have intended to mitigate the unfair consequences which result from the relation back of the bankruptcy by reducing the period of relation back from twelve months to three in section 37 (1) of the Bankruptcy Act, 1914.

If a bankruptcy petition is presented, then from the time of the first act of bankruptcy the debtor's goods cease to be his goods. From the moment the debtor becomes insolvent his goods must be distributed rateably amongst his creditors. It is not always possible to prove that a creditor has notice of an act of bankruptcy. It is submitted that the Act as it stands is a logical and coherent whole. Section 37 controls the sections which follow it. Sections 40, 41 and 42 are subject to the principle of relation back in section 37.

The question is whether as a result of section 40 of the Bankruptcy Act, 1914,² the trustee in bankruptcy was deprived of his

² Bankruptcy Act, 1914, s. 40, provides: "(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the

"receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

"(2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt . . ."

claim to the proceeds of sale of the goods seized by the registrar by way of levying execution against the debtor. Section 40 (1) begins: "Where a creditor has issued execution against the goods or lands of a debtor." A debtor is a person who has committed an act of bankruptcy, but the words "has issued" relate back to the period before the debtor had committed an act of bankruptcy. Then what are the consequences? The creditor is not to be entitled to retain the benefit of the execution "unless he has completed the execution . . . before the date of the receiving order." In this connexion he relied on subsection (3), which shows that there is contemplated by Parliament a type of invalid execution, namely, one levied after an act of bankruptcy. That is the view submitted to the court for the words of the section itself, but if there is any uncertainty in them reference can be made back to past Acts. *Wild v. Southwood*³ suggests that this argument is correct. That case dealt with the words of the Bankruptcy Act, 1883, s. 45, which are identical. The execution creditor's right to go against the property of the debtor does not hold good as against the trustee. The trustee's title relates back by virtue of section 37 of the Act of 1914 to the act of bankruptcy of September 8, 1949; and therefore it prevails against the payment of £10 to the registrar. Danckwerts J. took a contrary view, but it is submitted that he was incorrect.

[He then referred to Wace on Bankruptcy (1904 ed.), p. 253, where the successive enactments in reference to protected transactions are set out.]

Denys Buckley for the registrar. In the Bankruptcy Act, 1914, s. 18, the expression used is "property of the bankrupt," and this is defined in section 38, and section 37 shows what is the commencement of the bankruptcy. But in section 40 (1) the expression used is "the goods and lands of a debtor." That section applies upon the adjudication which is upon the goods and lands of the debtor. But when a creditor has levied execution against a person who is not a bankrupt because it is completed before the date of the receiving order, the relation back under section 37 has nothing to do with the property levied in execution because the execution was completed before the date of the receiving order. There is nothing in section 37 to say that the

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"(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases

"the goods in good faith under a sale by the sheriff shall, in all cases, acquire a good title to them against the trustee in bankruptcy."

³ [1897] 1 Q.B. 317.

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goods are not the goods of the debtor, but on adjudication the goods relating back to the act of bankruptcy are caught up. After the levying of the execution, however, the goods seized and sold had ceased to be the property of the debtor to be caught up: see also section 95 of the Bankruptcy Act, 1869, which recognized certain acts as valid before adjudication. Section 40 (1) of the Act of 1914 should be read as at the date of the execution as shown by the use of the word "debtor" and not "bankrupt." He referred to *In re O'Shea's Settlement*⁴ and *Wild v. Southwood*,⁵ where the statement in the judgment of Vaughan Williams J.⁶ is, it is submitted, incorrect in so far as he states that section 45 of the Act of 1883 (identical with section 40 of the Act of 1914) is "restrictive" and not "protective." Section 40 is, on the true view, a protective section. [He also referred to *In re Andrew*.⁷]

Muir Hunter in reply.

JENKINS L.J. (delivering the first judgment). This is an appeal from a judgment of Danckwerts J. whereby he rejected a claim by the Official Receiver, as trustee of the property of one John William Love, a bankrupt, to the effect that a sum of £10, received in the circumstances I am about to state by the registrar of the Kingston County Court, formed part of the assets of the estate of the bankrupt and was recoverable by the Official Receiver accordingly. [His Lordship then stated the facts.]

The question is whether the execution effected in the circumstances mentioned was a valid execution as against the Official Receiver or was invalid, so that its proceeds should be considered as part of the estate of the bankrupt. The question turns primarily on the true construction of section 40 of the Bankruptcy Act, 1914. [His Lordship read the section.]

There is no doubt as to the completion of the execution in this case, and there is no doubt that the execution was completed before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. *Prima facie*, therefore, the circumstances in which this execution was levied and completed were such as to comply with the provisions of section 40 (1). The subsection is stated in a negative form—that is to say, that the creditor shall not be

⁴ [1895] 1 Ch. 325.

⁵ [1897] 1 Q.B. 317.

⁶ *Ibid.* 319.

⁷ [1937] Ch. 122.

entitled to retain the benefit of the execution unless certain conditions are fulfilled—but, in my view, it is quite plain that *prima facie* the section must by necessary implication provide that, conversely, if the conditions are fulfilled, then the creditor shall be entitled to retain the benefit of the execution.

The learned judge delivered a considered judgment, in which he discussed the question involved in this case very fully and carefully, and he came to the conclusion that there was nothing in the arguments addressed to him on the part of the Official Receiver to justify a departure from what he considered to be the plain meaning of section 40 (1). Accordingly, he dismissed the Official Receiver's application. I have come to the same conclusion, after giving the best attention I can to the careful argument of Mr. Muir Hunter to the contrary. I might well content myself with saying that I adopt the learned judge's reasoning and conclusions, but, out of respect for Mr. Muir Hunter's argument, I will endeavour to state briefly my reasons for not accepting it.

Mr. Muir Hunter's argument is on these lines: He says that the fundamental principle of the bankruptcy law, as demonstrated by sections 37 and 38 of the Act, is that the commencement of a bankruptcy relates back to the date of the act of bankruptcy on which the petition is founded, and the vesting provisions of the Act operate accordingly. Section 38 provides that the property of the bankrupt divisible amongst his creditors shall not comprise certain immaterial exceptions, but shall comprise "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." Section 37 (1) provides that the bankruptcy of a debtor "shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition." The effect of that, said Mr. Muir Hunter, is that the bankruptcy of this debtor related back to, and was deemed to take effect from, September 8, 1949; so that, when he was adjudicated, the whole of the property of the bankrupt vested, as from September 8, 1949, in the Official Receiver. It follows, so proceeds the argument, that at the date when the first step in

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the execution was taken—that is to say, in effect, at the time of the issue of the writ of execution—there was nothing on which the execution could operate, inasmuch as, by the doctrine of relation back, the property of the debtor must be deemed already at that date to have vested in the trustee in bankruptcy. Mr. Muir Hunter says that if the provisions of section 40 are construed as I have construed them, the section will involve a departure from these fundamental principles. He contends, therefore, that the section should be read subject, as I understand it, to an implied qualification that, irrespective altogether of the question of notice, no execution can be valid unless it is put in motion before the commission of the relevant act of bankruptcy.

Speaking for myself, I find it extremely difficult to accept that argument, and I feel constrained to reject it on the short ground that it does not accord, as it seems to me, with the natural reading of the section. If I might adopt an argument addressed to us by Mr. Buckley, it seems to me that the natural meaning of section 40 (1) is this: It views the position at the point of time at which the adjudication takes place and the trustee embarks upon his administration of the bankrupt's estate. The question then arises: Has any creditor issued execution against the goods or lands of this debtor (or of this bankrupt, as by then he would be) on any date prior to this point of time? If the answer to that question is "Yes," then the next question which arises is: Did he complete the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor? If that question also falls to be answered in the affirmative, then, as it seems to me, the conditions of the section are satisfied. To introduce a new requirement to the effect that the execution should have been issued before the commission of any act of bankruptcy seems to me to involve an arbitrary re-modelling of the section. It is perfectly true that, when once a bankruptcy ensues, "relation back" operates, so that the property of the bankrupt is deemed to have been vested in the trustee as from the date of the act of bankruptcy, but, in my view, it does not follow from this that the property of a debtor not yet adjudicated bankrupt is to be treated for all purposes as if it was in fact already vested in the trustee. Here, at the date when execution was issued, there is no doubt at all that the property was the property of the debtor. True it is that, owing to the act of bankruptcy that had taken

place unknown to the creditor, the property was subject to the risk or contingency that, in the event of adjudication ensuing, it would vest in the trustee and when so vested would be deemed to have so vested from the date of the act of bankruptcy; but I think it is a very different thing to say that, when the position is considered as at the date of adjudication for the purposes of section 40 (1), it must be considered as if the trustee had in fact already had the property vested in him at the date when the creditor issued his execution.

Mr. Muir Hunter's argument derives its main support from the judgment of Vaughan Williams J. in *Wild v. Southwood*.⁸ The headnote in that case is: "A charging order under section 23 of the Partnership Act, 1890, upon a judgment debtor's interest in a partnership, being a proceeding in invitum, is not a 'trans-action' protected by section 49 of the Bankruptcy Act, 1883." *In re O'Shea's Settlement*⁹ followed. When in such a case the partners by direction of the court pay into court a sum of money in redemption or purchase of the interest charged, the transaction is not a 'completed execution' within the meaning of section 45 of the Bankruptcy Act, 1883. *Semble*, if the money had been paid out to the execution creditor or the partners had paid him the money direct, he would have got a 'good title.' Section 45 of the Bankruptcy Act, 1883, is the section corresponding to section 40 of the present Act.

The learned judge, in delivering his judgment, stated very briefly the facts, and then said¹⁰: "Now, what are the rights of the plaintiff, who is the execution creditor? I will first deal with his rights, irrespective of section 49"—that is the section corresponding to section 45 of the present Act—"which is the protective section, or section 45, which I think is a restrictive section. What is the right of the execution creditor? His right is to seize the goods or property of the bankrupt, and to levy execution thereon. He has no right to seize or levy execution on the property of any one else. Now, at the date when the first step towards getting execution, or anything in the nature of execution, was taken, was the interest of the bankrupt in the partnership property his property or not? If it was his property, the execution creditor had a right to go against it; if it was not, the creditor had no such right. The first step towards obtaining the charging order was the taking out of the summons on April 20, 1896, and at that time the

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⁸ [1897] 1 Q.B. 317.¹⁰ [1897] 1 Q.B. 319.⁹ [1895] 1 Ch. 325.

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“bankrupt’s interest in the partnership had ceased to be his
“interest. It had vested in the official receiver, and became the
“property of the trustee in bankruptcy in the events which
“happened. This law of relation back, which makes the title of
“the trustee vest as from a date antecedent to the transaction or
“event which took place without any petition in bankruptcy
“having occurred or a receiving order having been made, operates
“no doubt very hardly in many cases, and therefore various Acts
“of Parliament have contained protective sections to relieve those
“persons who would be injured by the stringency of that law.”

So the learned judge, down to that point, is, I think, undoubtedly expressing a view that, save in so far as particular sections might produce some different result, the effect of the doctrine of relation back would be as contended by Mr. Muir Hunter in the present case; the learned judge down to this point having dealt with the matter on the general principles of the bankruptcy legislation without considering the particular effect of any section, whether of the class termed by him as “restrictive” or of the class termed by him as “protective.”

The judgment continues: “Apart from those protective
“sections, it is plain that this execution cannot hold good against
“the trustee in bankruptcy whose title relates back to a period
“anterior to it. Then is this execution within the protective
“section? That is section 49 of the present Bankruptcy Act.”
As I have said, the section there mentioned corresponds to section 45 of the Act of 1914. Perhaps I had better refer to it:
“Subject to the foregoing provisions of this Act with respect to
“the effect of bankruptcy on an execution or attachment, and
“with respect to the avoidance of certain settlements, assign-
“ments and preferences, nothing in this Act shall invalidate, in
“the case of a bankruptcy—(a) any payment by the bankrupt
“to any of his creditors; (b) any payment or delivery to the
“bankrupt; (c) any conveyance or assignment by the bankrupt
“for valuable consideration; (d) any contract, dealing, or trans-
“action by or with the bankrupt for valuable consideration.”
Then there are certain provisoes which, to describe them very shortly, limit this validation to cases of transactions done before the date of the receiving order and without notice of any available act of bankruptcy. Section 49 of the Act of 1883 was in the same or substantially similar terms.

The judge went on: “In my judgment this execution creditor
“cannot rely on that section, because, as I understand the case

“ of *In re O'Shea's Settlement*,¹¹ it is a distinct decision that
 “ the obtaining of a charging order under section 14 of the Judg-
 “ ments Act, 1838, is not a ‘ transaction ’ within the meaning of
 “ section 49. But then it is said that that decision does not apply
 “ to a charging order obtained under section 23 of the Partnership
 “ Act, 1890. I do not accede to that argument at all. It seems
 “ to me that whether the charging order is obtained under the
 “ Judgments Act, 1838, or under the Partnership Act, 1890, it is
 “ a proceeding in invitum, and cannot be called a ‘ transaction ’
 “ within the meaning of section 49. In effect, *In re O'Shea's*
 “ *Settlement* ¹¹ decides that the transactions protected by section
 “ 49 are voluntary transactions between the bankrupt and those
 “ with whom he is dealing. I think, therefore, that section 49
 “ does not apply.”

The judge, having thus disposed of what he termed “ the pro-
 “ tective section,” turned to section 45, the present section 40:
 “ Then it is said that section 45 assists this execution creditor.
 “ All I say is that, if it is a protective section, then the decision in
 “ *In re O'Shea's Settlement* ¹¹ deprives him of the benefit of it.
 “ But if it is a restrictive section the question does not arise,
 “ because the restrictive section can clearly give him no larger
 “ rights than he would have under section 49. I have therefore
 “ disposed of that part of the case.”

The judge proceeds: “ It remains for me to deal with the
 “ argument that this money paid into court ought to be paid out
 “ because it is not and never has been part of the bankrupt's
 “ estate. I do not agree with that at all. The Partnership Act,
 “ 1890, in effect gives to the continuing partner the right to buy
 “ out the execution; and in such a case the money might be paid
 “ direct to the execution creditor. I do not say what would have
 “ been the effect if the money had been paid out of court to the
 “ execution creditor. But having regard to the omissions from
 “ section 49 of that which formed part of protected transactions
 “ in section 133 of the Bankruptcy Act, 1849, I am disposed to
 “ think that the execution creditor would probably have got a
 “ good title. But I have not to decide that point. I have only
 “ to deal with the point made.” Then the learned judge went on
 to say, in effect, that the money paid into court represented part
 of the proceeds of the bankrupt's interest in the partnership just
 as much as if it had been actually sold. Being part of the bank-
 rupt's estate divisible amongst his creditors, it had to be paid
 out to the trustee.

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¹¹ [1895] 1 Ch. 325.

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This judgment, particularly in view of the fact that it was the judgment of a judge who was, as is well known, exceptionally well versed in bankruptcy matters, is one to be treated with the greatest respect, and the more so because it appears to have stood without comment since 1896. But it does not seem to me that it really amounts to a decision in Mr. Muir Hunter's favour on the point now at issue. I think that, in the end, the learned judge left that point open when he said: "I do not say what " would have been the effect if the money had been paid out of " court to the execution creditor. But having regard to the " omissions from section 49 of that which formed part of pro- " tected transactions in section 133 of the Bankruptcy Act, 1849, " I am disposed to think that the execution creditor would " probably have got a good title."

Section 49 is, as I have mentioned, the section corresponding to section 45 of the present Act. The precursors of that section were section 95 of the Bankruptcy Act, 1869, and section 133 of the Bankruptcy Act, 1849. They were what the judge in *Wild v. Southwood*¹² described as protective sections. Both of those sections, as I understand them, afforded express protection to executions completed after but without notice of an act of bankruptcy and before the date of the fiat or the filing of the petition (under section 133 of the Act of 1849) or before the date of adjudication (under section 95 of the Act of 1869). There is no doubt that under either of those sections, as I understand it, the execution in the present case would have been valid. So, when the judge in *Wild v. Southwood*¹² says "having regard to the " omissions from section 49 . . . of protected transactions in " section 133 of the Bankruptcy Act, 1849," he seems to me to be saying: "These are transactions which would formerly have " been protected under section 133. They are now omitted from " the corresponding section 49; so that I am disposed to think, " in construing section 45"—that is section 40 of the present Act—"that if an execution creditor completes his execution with- " out notice of an act of bankruptcy, he probably gets a good " title, even under the new section 45 as it stands." That, as it seems to me, is what the learned judge was in effect saying, and he left the point in suspense by saying he thought it was probable, but he had not got to decide it. Accordingly, the matter being one which, of course, is open in this court, whatever the proper construction of the decision in *Wild v. Southwood*¹²

¹² [1897] 1 Q.B. 317.

may be, I do not think this is a case where the court should feel any embarrassment in arriving at its own conclusion notwithstanding *Wild v. Southwood*,¹² because the question really at issue here seems to me to have been left in suspense in that case.

I should perhaps also refer to *In re O'Shea's Settlement*,¹³ cited in *Wild v. Southwood*.¹² The point decided in that case was that a charging order, under section 14 of the Judgments Act, 1838, was not a "transaction" protected by section 49 of the Bankruptcy Act, 1883, and such an order had not for all purposes the same effect as if it had been voluntarily given by the judgment debtor. That was the decision relied on by Vaughan Williams J. in holding that the charging order in *Wild v. Southwood*¹² was not a "transaction."

Lord Halsbury said¹⁴: "I think we are all agreed that Mr. Mackenzie's construction of section 49 is correct, and that this 'charging order is not a 'transaction' protected by that section. 'The order is really more in the nature of an execution. But that will not help the respondent. It is impossible, to my mind, to give any other interpretation to the word 'transaction.' I agree with what Mellish L.J. said in *In re Wright*.¹⁵ 'It seems to me that a 'transaction' is very much the same thing as a 'dealing.' " Lindley L.J. said¹⁶: "I am of the same opinion. The substantial question is whether a charging order obtained upon the fund in court, under the Judgments Act, 1838, s. 14, falls within either section 45 or section 49 of the Bankruptcy Act, 1883, and is valid as against the trustee in bankruptcy of the judgment debtor, whose title relates back to a time anterior to the charging order. Unless the charging order is protected under one or other of those sections, it is not protected at all as against the trustee's title relating to a time anterior to it. Therefore, the question we have to consider is whether the charging order is either a protected 'execution' within section 45, or a protected 'transaction' within section 49. It is clearly impossible to hold that the charging order is a protected execution within section 45, and Mr. Hall has very properly declined to argue that it is." Then the learned Lord Justice went on to consider the question whether it was a "transaction." That passage in Lindley L.J.'s judgment is, in my view, significant, in that he regarded both section 45 and section 49 of the Act of 1883 as protective sections. He did not recognize the distinction drawn by Vaughan Williams J. between

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¹³ [1895] 1 Ch. 325.¹⁴ *Ibid.* 329.¹⁵ (1876) 3 Ch.D. 70.¹⁶ [1895] 1 Ch. 330.

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section 45 as restrictive and section 49 as protective. Accordingly, notwithstanding Mr. Muir Hunter's argument and notwithstanding what was said by Vaughan Williams J. in *Wild v. Southwood*,¹⁷ in my judgment there is no sufficient ground for construing section 40 of the Act of 1914 otherwise than in accordance with the plain meaning of the language of the section read by itself. When it is so read, I agree entirely with the learned judge's conclusion as to its true construction. I agree with him, too, that it would be surprising if the re-arrangement of the Act which took place in 1883, when completed executions were put in a category by themselves in what was then section 45 of the Act and removed from what had formerly been section 133 of the Act of 1849 and section 95 of the Act of 1869, should have had the drastic result of depriving execution creditors of a protection which they had hitherto enjoyed, based on the reasonable criterion of notice. That disposes of the main question in the appeal, which I have said I might well have disposed of much more rapidly by merely adopting the reasoning of Danckwerts J., with which I entirely agree.

A point was raised on the part of the registrar of the Kingston-on-Thames County Court which, having regard to the view I have taken on the main question argued in the appeal, is not now necessary to be decided. The point is this: It is claimed that the provisions of section 40 of the Bankruptcy Act, 1914, in so far as they might otherwise operate to defeat the recovery of the £10 fines, are not binding upon the Crown and therefore cannot be relied on against the registrar of the county court, inasmuch as in collecting these fines he was, I suppose, acting on behalf of the Crown. That being a question which it is not necessary to decide in order to determine the result of the appeal, I do not propose to express any view upon it, except to say that so far I have not been satisfied that section 151 of the Act of 1914 does not have the effect of making this particular provision binding upon the Crown; but I am not to be regarded as expressing any concluded opinion upon that matter.

For these reasons, in my judgment, this appeal fails and should be dismissed.

EVERSHED M.R. I am of the same opinion. The judgment of Danckwerts J. was a reserved judgment, and my brother has already fully stated the reasons, which commend themselves to me, for his own conclusion; but, since the matter is of some significance, I wish to add a few observations on two points.

¹⁷ [1897] 1 Q.B. 317.

The facts, so far as relevant, are that the respondent, in his capacity as registrar of the county court, succeeded in getting into his hands a sum of £10, being the amount of two fines imposed by the court upon the debtor. He succeeded in obtaining that sum through the medium of an execution levied by himself in his capacity as high bailiff upon certain goods, supposedly goods of the debtor. At the time that he got the sum of £10 into his hands, no receiving order had been made against the debtor and he had received no notice of any presentation of a bankruptcy petition against the debtor or of the commission of any available act of bankruptcy by the debtor. But, as it now has since turned out, prior to his starting to levy execution, an act of bankruptcy had in fact been committed by the debtor and on that act of bankruptcy his subsequent adjudication was founded. On those facts, the short question is whether the language of section 40 (1) of the Bankruptcy Act, 1914, entitles the respondent in his capacity as registrar of the county court to retain the £10 I have mentioned against the trustee in bankruptcy.

Now the subsection is expressed negatively: "Where a creditor has issued execution against the goods or lands of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order. . . ." As a matter of construction of what is relatively simple language, I should have no doubt, reading that subsection without more, that the affirmative was implicit in the negative, that is, that if the creditor had completed the execution before the date referred to, and without such notice as is mentioned, then he would be entitled to retain against the trustee the proceeds of the execution; but the main argument has been that such a view of construction disregards the effect of sections 37 and 38. It is, of course, clear, that one cannot construe one subsection without due regard to the other relevant provisions of the Act. But, in my judgment, no such conflict is caused by the earlier sections. Section 38 is concerned to define what is the property of the bankrupt divisible among his creditors in the bankruptcy. That phrase, which is made a term of art, is said to comprise, among other things, the property vested in the bankrupt at the commencement of the bankruptcy. Section 37 tells you that the bankruptcy is to be deemed to have relation back to, and to commence at, the time of the relevant act of bankruptcy. Still, the vesting in the trustee, by the

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language of section 18, occurs upon and not before the adjudication. You have, therefore, the somewhat artificial conception that there vests on adjudication, among other things, property which was vested in the bankrupt at a past date. It still does not seem to me, however, inaccurate to say that at the time that the registrar in the present case levied his execution he was levying execution in truth upon what then were "the goods of "the debtor." If that be right, then I cannot give such an effect to the phrase "shall be deemed to have relation back to "the act of bankruptcy" as to disentitle the respondent to say that he was doing something comprised within the terms of section 40 and, as he had completed the execution before the relevant date and without any such notice as is specified, he is entitled to retain the sum of £10.

My principal difficulty in the case has been caused by the language of Vaughan Williams J. in the case of *Wild v. Southwood*.¹⁷ If that decision (though it is, of course, a decision of a judge of first instance) were a decision directly in point I should be disinclined to overrule it after a period of 55 years (during which a new Bankruptcy Act had come into operation, substantially identical in terms with the Act considered by Vaughan Williams J.); for in such a period of time many persons, and particularly the Official Receiver and his department, would presumably have regulated their affairs according to the decision. But, in the first place, it is not a decision directly in point. As my brother has observed, it was an essential characteristic of the facts in *Wild v. Southwood*¹⁷ that the execution had not been completed and therefore, as the judge pointed out, in so far as the execution creditor (or what was equivalent to the execution creditor) sought to rely upon section 45 (now section 40), he was disabled from claiming the benefit of the section, because he had not completed the execution. On the other hand, it is true that certain language used by the judge seems to give a greater effect than I would be disposed to do to the language of section 37; for in the beginning of his judgment Vaughan Williams J. says that at the date of the summons taken out to obtain the charging order the bankrupt's interest in the partnership had ceased to be his interest by the doctrine of relation back. I think that is not strictly accurate. I think it is part of the reasoning that the judge treated the doctrine of relation back as being necessary to his conclusion,

¹⁷ [1897] 1 Q.B. 317.

and I think that he also gave to what is now section 40 the label "restrictive provision"; but, in my judgment, the language used not being accurate without qualification, it does not really affect the matter of construction whether section 40 (1) is called restrictive or protective (as Lindley L.J. appeared to do in *O'Shea's case*¹⁸). The precise point in *Wild v. Southwood*¹⁷ being different from that with which we are concerned, I am not prepared to say that the language of the judgment is such that we ought to treat it as laying down a principle covering this case. I therefore do not think that the case of *Wild v. Southwood*¹⁷ ought to prevent me from giving effect to what I regard as the true construction of these sections.

I add nothing more, except that I agree with the reasoning of my brother Jenkins as regards the question of the Crown being bound. I agree that the appeal should be dismissed.

MORRIS L.J. I find myself in full agreement with the conclusion and the reasoning of the judgments which have been given.

Appeal dismissed.

Solicitors: *Solicitor, Board of Trade; Treasury Solicitor.*

H. C. G

¹⁷ [1897] 1 Q.B. 317.

¹⁸ [1895] 1 Ch. 325.

WILKIE v. INLAND REVENUE COMMISSIONERS.

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In rule 2 of the Miscellaneous Rules Applicable to Sch. D to the Income Tax Act, 1918, which exempts from income tax in respect of profits or gains from possessions or securities outside the United Kingdom, a person who (1) is there for a temporary purpose; (2) has no intention of establishing his residence there; and (3) has not actually resided there, at one time or several times, equal in the whole to six months in any year of assessment, the word "months"

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means calendar and not lunar months. In computing the period of six months, there is no rule of law requiring that a fraction of a day is to be reckoned as a whole day, and regard may be had not merely to days, but also to hours, and if the total of the hours of residence does not amount to the number of hours in six calendar months, exemption from tax may be claimed.

CASE STATED by commissioners for the Special Purposes of the Income Tax Acts.

The appellant, J. S. Wilkie, was born in Scotland in 1887. He went to India at the age of 21 and had since lived and worked there with occasional visits to the United Kingdom on leave. One such visit took place in 1947, on which occasion the appellant arrived in this country at about 2 p.m. on June 2, intending to return in November, 1947, but owing to the fact that he had to undergo an operation and that a passage booked by him for November 30 was cancelled by the British Overseas Airways, his departure was delayed until about 10 a.m. on December 2, 1947. During the fiscal year 1947-48 the appellant had income from possessions outside the United Kingdom, including income from 240 shares in the International Nickel Co. of Canada. The dividends on these shares were entrusted to a paying agent in the United Kingdom for payment to shareholders who were either resident in this country or desired that they should be paid here. Under Miscellaneous Rule 7 of Sch. D to the Income Tax Act, 1918, the paying agent was assessed to income tax on the dividends in question and accounted to the person concerned for the balance. In the case of the 240 shares held by the appellant in the Canadian company the gross dividend payable was reduced by £14 5s. 6d., that being the tax appropriate to £47 11s. 8d. after taking Dominion income tax relief into account. The appellant claimed repayment of the £14 5s. 6d. deducted on the ground that he was not liable to tax by reason of the provisions of Miscellaneous Rule 2 applicable to Sch. D to the Income Tax Act, 1918,¹ by reason of the facts that he was in this country in

¹ Rule 2 of Miscellaneous Rules applicable to Sch. D to the Income Tax Act, 1918: "A person shall not be charged to tax under this Schedule as a person residing in the United Kingdom, in respect of profits or gains received in respect of possessions or securities out of the United Kingdom, who is in the United Kingdom for some temporary purpose only, and not with

"any view or intent of establishing his residence therein, and who has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment, but if any such person resides in the United Kingdom for the aforesaid period he shall be so chargeable for that year."

1947 for a temporary purpose and not with any view or intent of establishing his residence in the United Kingdom, and, further, that he did not actually reside in the United Kingdom in 1947-48 for six months. It was admitted by the Crown that the appellant was in this country for a temporary purpose only, and not with any view or intent as aforesaid, but it was alleged that he had actually resided here for six months. The appellant's application for repayment was accordingly refused and he appealed to the special commissioners.

Before the special commissioners it was contended for the appellant that in considering whether or not he was in this country for six months the rules for the computation of time prevalent in Scottish law should prevail. Under that system (it was alleged but not proved) that the day of the appellant's arrival would be excluded in reckoning the six months, with the result that as he arrived at about 2 p.m. on June 2, and left at 10 a.m. on December 2, the period of six months would not expire until midnight on the latter day, by which time the appellant had left the country.

It was further contended for the appellant in the alternative that his stay until December 2 was against his will and he could not, therefore, be regarded as having been in this country for six months.

It was contended for the Crown before the commissioners that in computing the period during which the appellant resided here it was an established rule of law that fractions of a day should count as a whole day. The application of that principle made the period June 2 to December 2, 1947, six months and one day, and the appellant must, therefore, be regarded as a resident in the United Kingdom for the year 1947-48, and taxed accordingly.

The commissioners upheld the Crown's contentions and dismissed the appeal, stating a case for the opinion of the court on the application of the appellant.

J. Pennycuick K.C. and *J. H. Bowe* for the appellant.

Sir R. Manningham-Buller S.-G. and *R. P. Hills* for the respondents.

The arguments fully appear from the judgment.

December 12. DONOVAN J. read a judgment which, after stating the facts, continued:—Before me the appellant abandoned both the arguments he had advanced to the special commissioners, and a fresh argument, of which due notice was given to the Crown,

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was employed. It is now said that under the express words of Miscellaneous Rule 2 a person is not to be charged who (1) is here for a temporary purpose; (2) has no intent of establishing his residence here; (3) has not actually resided here for six months in the year of assessment. Conditions (1) and (2) of this non-chargeability are admittedly satisfied. The whole question, therefore, is, can the appellant show that he did not actually reside in the United Kingdom for six months in 1947-48? He says he can, for there is nothing in the rule to prevent lower units of time than a day from being taken into account, for example, hours; and he spent less hours in the United Kingdom than there are hours in six months. He says that to give effect to the word "actually" in the rule you must, in a case like the present, have regard to a lower time unit than one day. Alternatively, he contends that, even applying the so-called established rule for the computation of time, he actually resided elsewhere than in the United Kingdom for the whole of June 2, 1947, and the whole of December 2, 1947, because for part of each of these days he did not actually reside in the United Kingdom. That is true. Therefore, he says he did not actually reside in the United Kingdom for the period April 6, 1947, to June 2, 1947, inclusive, and for the period December 2, 1947, to April 5, 1948, inclusive. This makes less than 183 days. It was a leap year in 1948; therefore 1947-48 comprised 366 days, of which one-half is 183.

The appellant asks whether the alleged established rule for computation of time, that is, counting fractions of a day as a whole day, is to operate solely in the Crown's favour when rule 2 is being construed.

The Crown's argument before me included an invitation to give an affirmative answer to this question. But the Crown also advanced a new and more radical contention. They said the expression "six months" in the rule means six lunar months. A lunar month is twenty-eight days, and six lunar months, therefore, comprise 168 days. The appellant was admittedly actually resident in the United Kingdom for more than this number of days in 1947-48, and, therefore, he is taxable.

If this interpretation of "six months" be right, there is an end of this case, and I, therefore, proceed at once to consider it. The argument runs thus: Rule 2 is a reproduction of section 39 of the Income Tax Act, 1842. In 1842 the word "month", when used in a statute, meant, in the absence of a special definition to the contrary, a lunar month: see the authorities cited in Stroud's

Judicial Dictionary, 2nd ed., at p. 1224. The Interpretation Act, 1889, by section 3, provides that in all Acts passed since 1850 "month" means calendar month unless the contrary intention appears. The contrary intention does appear in the present Income Tax Act passed in 1918. For the legislature cannot have intended to alter rule 2 so as to change the meaning of "six months" in that rule from lunar into calendar months, since that would make the rule unworkable.

Before dealing with this argument, I had better explain why the Crown alleges that rule 2 would be unworkable if "six months" be construed as six calendar months. The rule prescribes as one condition for exemption from tax that the person involved "has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment." So that where a person was actually resident here intermittently in the year of assessment, you must necessarily find out how many days he was here and add up the number and see if "in the whole" they equal the number of days in six months. You can do that, says the Crown, by treating "month" as meaning simply 28 days, that is a lunar month. You cannot do it by treating the word as meaning calendar month. For example, suppose a person is here for 15 days in May, 15 days in June and 15 days in July, how many calendar months is that, seeing that a calendar month may be 28, 29, 30 or 31 days according to which month you choose, and whether it is leap year or not? Therefore, starting with the proposition that before 1850 lunar month meant calendar month, which makes the rule workable, it must be assumed that the legislature did not in 1918 intend to make it unworkable. Six months, therefore, still means six lunar months.

I am not prepared to accept the initial premise upon which this argument is based. For if six months in the Act of 1842 meant six lunar months, there was no need for the legislature to deal with the case of an intermittent actual residence in the way it did. It dealt with that case by enacting that a person should not be charged who had not "actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment." But if "month" meant "lunar month," then since "lunar month" simply means 28 days, all that the legislature needed to do, to cover both continuous and intermittent actual residence, was to say, "who has not actually resided in the United Kingdom for

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"six months in the year of assessment." Then you could add up the days of residence simply to find out whether they totalled six times 28, namely, 168 days.

Moreover, I see no rational purpose behind a provision that the months shall be lunar months. When one is determining how long a foreigner or a Briton from abroad should be allowed to stay in the United Kingdom before contributing, through income tax, to the expenses of the State, there is at least something intelligible, if arbitrary, about selecting one-half of the fiscal year. But to tax him because he has been here for 168 days out of 365 is unintelligible and merely whimsical.

In any event, if the Crown's initial premise were correct, I think the Interpretation Act does involve that "six months" in rule 2 now means six calendar months, for I reject the view that a contrary intention can be read into the Income Tax Act, 1918, for the reasons suggested by the Crown: inasmuch as I hope to show that the rule does not become unworkable by construing "six months" as six calendar months.

If that be the right construction of the term, then this much at least is common ground: that it is right to apply the rule by adding up the number of days a person has been actually resident in order to see whether those days, whether continuous or discontinuous, equal the number of days in six calendar months. This method seems to me to be free from difficulty in the ordinary case.

But what is one to do about fractions of a day, for a person's stay will almost always begin and end with a fraction of a day? There are these alternatives: (1) To disregard altogether the day of arrival and to treat the day of departure as a whole day. Such a proceeding is, in my view, more appropriate where the words prescribing the period are words such as "so many days *from* a particular event." The expression I have to construe is simply "for a period equal to . . . six months." (2) To include the day of arrival as a whole day and to ignore the day of departure. For such a test I see no justification here. (3) To ignore both the day of arrival and the day of departure altogether. This, however, is appropriate, in my view, only when the expression to be construed is "so many clear days," or words to that effect. (4) To treat both the day of arrival and the day of departure as whole days. It is for this latter method that the Crown contend, and this, whether "six months" means six lunar or six calendar months. Applying it to the present case, the result is, they say, as follows. The appellant was here from June 2 to December 2,

1947. On June 2 and on December 2 he was here for part of the day. Treat each of those days as a full day of actual residence on the part of the appellant. On this basis he was here for 184 days, which is over one-half of 1947-48, which, as I have said, comprised 366 days; so he was here for six months in the year of assessment and is taxable.

To determine whether this is the right approach to the problem, I think it is desirable to bear in mind the precise circumstances in which rule 2 comes into operation.

First of all, there is a charge to tax imposed under Sched. D by the opening words of rule 1 on income arising to any person residing in the United Kingdom from property whether situate in the United Kingdom or elsewhere. Then Miscellaneous Rule 2 provides that a person shall not be charged to tax under Sched. D if he proves three things: (1) he is here for a temporary purpose; (2) he has no intention of establishing his residence here; (3) he has not actually resided here on and off for six months in the year of assessment.

In the present case, the first two conditions are admittedly satisfied; and so, when face to face with the Revenue, the appellant has to prove, and to prove only, his satisfaction of condition No. 3. He can do that if he also can pray in aid the method of treating fractions of a day as a whole day. For he was actually resident outside the United Kingdom for part of June 2, 1947, and for part of December 2, 1947. Treating each of those days as a full day of actual residence outside the United Kingdom, then he was so resident for more than 183 days; that is, for more than six months. Therefore, he was not actually resident in the United Kingdom for six months.

Why should not the appellant, as well as the Crown, invoke the rule about treating fractions of a day as a whole day? Because, says the Crown, what you are really determining under the rule is how long a person is actually resident here and nothing else. I do not accept this. You are also determining how long he has not actually resided in the United Kingdom. In the order of events it is the taxpayer who has to prove that first. No doubt one method of doing this is to prove how long he actually resided in the United Kingdom. But that does not make it right to say that that is the only issue to be decided under the rule. Indeed, if the taxpayer fails to prove that he actually resided outside the United Kingdom for the requisite period, then he does not displace the existing charge to tax: so that the concluding words of the rule beginning "but if any such person"

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give the Crown no greater rights to tax than they would have if the words were not there, as the Solicitor-General agreed.

One view of how rule 2 should be construed is, therefore, this: The taxpayer can treat any day for a part of which he was not actually resident in the United Kingdom as being a day for the whole of which he was not so actually resident, that is, by invoking the rule that fractions of a day count as a whole day. If the result is to show that he was actually resident outside the United Kingdom for a number of days greater than the number of days in six calendar months of the year of assessment in question, then he qualifies for the exemption, and the inquiry need go no further. One need not go on to consider the effect of the concluding words of the rule.

This view, I confess, makes a very strong appeal to me. But it does side-step any difficulty that may arise if one takes into account the concluding words of the rule and applies, in any given case, the same method of treating fractions of a day as a whole day. On the whole, I feel it is better to face any such difficulty, and to see whether there is any reasonable construction of the rule which will resolve it.

The concluding words of the rule are "but if any such person "resides in the United Kingdom for the aforesaid period he shall "be so chargeable for that year." Applying the same rule about fractions of a day, one arrives at the result in this case, as already narrated, that in 1947-48 the appellant was actually resident in the United Kingdom for 184 days, that is over six months. So that, by applying that rule about fractions of a day one gets the absurdity that the taxpayer is actually resident outside the United Kingdom for more than six months, and actually resident inside the United Kingdom for more than six months. In other words, he is both exempt and chargeable under the rule. This absurdity, remarkable even in an Income Tax Act, the Crown seeks to resolve by asserting that really the thing one is seeking to discover under the rule is whether the taxpayer was actually resident in the United Kingdom for six months and seeking to discover nothing else. I have already given my reasons for disagreeing with that view.

The appellant says the absurdity can easily be avoided by rejecting the method of treating fractions of a day as a whole day; and he says it would be right to do so on any question arising under rule 2 at any rate. The reasons are these: First, because there is no general rule established in English law that fractions of a day should count as a whole day. The method to

be employed in computing time must be determined by the terms of the instrument, be it statute or something else, which requires the computation. In *In re North*,² Lord Esher M.R., sitting in the Court of Appeal, said: "I think that this appeal should be dismissed. No general rule exists for the computation of time either under the Bankruptcy Act or any other statute, or, indeed, where time is mentioned in a contract, and the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made. Notwithstanding the elaborate array of authorities which have been cited to us, they seem on being sifted to contain no binding rule to the effect that time must be computed according to a hard and fast rule; that seems clear from the judgment in *Lester v. Garland*,³ in which Sir William Grant, after a learned examination of the whole subject, laid down what I conceive to be the wholesome view that no general rule exists."

Secondly, because the terms of rule 2 require the period of "actual" residence to be computed, and "actual" means "truly, and in fact," and is the reverse of notional. If, therefore, the so-called general rule is out of the way, why, in order to determine the actual period that a person is resident outside the United Kingdom or inside it, should you not use in the computation a lower unit of time, if it be necessary to do so to arrive at the truth and avoid a fiction? To do that here you should look at complete days of actual residence and actual non-residence, and at the hours in the case of days when the appellant was here for a part of the day and elsewhere for the rest; and then see whether or not it all adds up to the amount of time that there is in six months. If you do that, and express the appellant's period of actual residence in this country in hours, you find—as is the truth—that he was here for a less number of hours than there were in six calendar months of 1947–48.

In answer to this, the Crown says that such a construction would impose such an undue administrative burden on the revenue that the legislature could never have intended it. The revenue officers, they say, would have to discover the exact hours of arrival and departure of the taxpayer, making allowances for summer time here and abroad, and even perhaps deciding when the 3-mile limit of the territorial waters of the United Kingdom was crossed.

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² [1895] 2 Q.B. 264, 269.³ (1808) 15 Ves. 248.

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The argument of undue administrative inconvenience is a legitimate one when considering which of two rival constructions of a statute should be adopted; but it has very little weight in the present case. For the burden of proving the facts justifying exemption under rule 2 lies upon the taxpayer, who has to establish his case for exemption. And the cases where it is necessary to get down to hours in this connexion must be very rare. Rule 2 has been in operation for 109 years at least, and this is the first time that the courts have been asked to construe the words "six months" appearing in it. The reason, no doubt, is that those desiring to obtain the benefit of the rule take care to give themselves a margin of safety, and will continue to do so wherever possible. I do not think, therefore, that the construction contended for by the taxpayer involves any administrative nightmare.

On the other hand, that construction has these merits. First, it gives effect to the word "actually." Secondly, it makes the rule entirely workable. Thirdly, it makes the operation of the rule the same in Scotland as in England, and there is some reason, as the case stated discloses, at least to suspect that the rule whereby fractions of a day sometimes count as a whole day in England does not prevail in Scotland.

I come to the conclusion that the appellant's construction should be upheld; and I declare that when computing the period of six months for the purposes of rule 2 there is nothing in the language of the rule to prevent hours being taken into the computation; but that, on the other hand, since what has to be determined is the period of actual residence, it is legitimate to do so.

Several judicial decisions were cited to me on how time has been computed under other statutes for other purposes; for example, what a sentence of six months' imprisonment involves. The result was an interesting hour or two; but since the present point is free from judicial authority, and I can find a solution within the four corners of the rule itself and the argument I have heard upon its language, I do not further burden this judgment with a recitation and examination of those other cases.

Finally, I should recall that the appellant's argument before me was totally different from that before the special commissioners. And the Crown, in turn, advanced an argument that the commissioners never heard, namely, that "month" in the rule meant "lunar month." The special commissioners obviously

devoted much time and care to the consideration of the arguments which they did hear; and, since I am reversing them, it is only fair that I should record that I do so as a result of contentions which they never had an opportunity of considering. The appeal is allowed.

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Appeal allowed.

Solicitors: *May, May & Deacon; Solicitor of Inland Revenue.*

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Charity—Bequests to bring “masterpieces of fine art within the reach of the people of Ireland of all classes” and for the teaching “of self control, elocution, oratory, deportment, the arts of personal contact, of social intercourse, and the other arts of public, private, professional and business life”—Educational purposes—Evidence—Valid charitable trusts.

A testatrix bequeathed the residue of her estate on the following trusts: “The making of grants contributions and payments to any foundation corporate body institution association or fund . . . having for its object the bringing of the masterpieces of fine art within the reach of the people of Ireland of all classes in their own country . . . The teaching promotion and encouragement in Ireland of self control, elocution, oratory, deportment, the arts of personal contact, of social intercourse, and the other arts of public, private, professional and business life . . .”

The testatrix was of Irish origin, but she had acquired an English domicile when she died. In her will she expressed a desire that it should be construed on the footing that her domicile was English. On a summons taken out by the surviving trustee of her will to have determined the validity of those trusts:—

Held, that the trusts of the will were wholly educational in character, and that, that fact being established, evidence was not required to show that they were beneficial to the community; and they therefore constituted valid charitable trusts under English law.

ADJOURNED SUMMONS.

The testatrix, Charlotte Frances Shaw, was the wife of George Bernard Shaw, the well-known man of letters. Her will was dated September 2, 1937. In clause 1 she expressed a desire to be cremated and that her ashes should be taken to Ireland and scattered on Irish ground. By clause 2 she declared her wish and

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intention that her will should be construed and operate on the footing that she had an English domicile. By clause 3 she appointed her husband and the National Provincial Bank Ltd. to be the executors and general trustees of her will, and as from the date of her death, or the subsequent death of her husband, she appointed the National City Bank Ltd. of Dublin (thereinafter called "the Irish Bank") to be the special trustee of her will as respects the ultimate trust fund mentioned in her will.

The testatrix died on September 12, 1943, and her will was proved by her husband and the National Provincial Bank Ltd. in the principal probate registry. Her husband, George Bernard Shaw, died on November 2, 1950. Both the testatrix and her husband were of Irish origin, but for many years before her death the matrimonial home had been in England.

After making various dispositions and giving various directions, not relevant to this report, the testatrix, by clauses 11 to 15, constituted a residuary trust fund of which by clause 16 she provided that her husband, if he survived her, should receive the income during his life.

By clause 17 she directed that, subject to such life interest, a sum of £20,000 should be raised out of the trust fund and held on specified trusts. Clause 18 provided that, subject to the preceding trusts, her trustees should stand possessed of that trust fund, or the residue of it, defined as the ultimate trust fund, on trust as soon as conveniently might be after the death of her husband (in the event, which happened, of his surviving her) to transfer to, and vest the same in, the Irish Bank.

The main question for the determination of the court was as to the validity or otherwise of the trusts declared in the will concerning the ultimate trust fund. The only persons who would be interested in her estate under her intestacy, if the trusts were invalid, were her husband and her niece, Cecily Charlotte Colthurst. The legacy of £20,000 given by clause 17 of the will had been paid and satisfied, and the ultimate trust fund now consisted of investments and cash of an approximate value of £72,990, and also a reversion to a fund retained to provide for the payment of certain annuities consisting of investments of an approximate value of £21,750.

The material clause for the present proceedings was clause 19, which defined the trusts of the ultimate trust fund. That clause was divided into three sub-clauses, of which the first two were sub-divided into lettered paragraphs.

The first of the three sub-clauses of clause 19 was in the form of recitals. It read thus: "(i) Whereas: (a) I am desirous of promoting and encouraging in Ireland the bringing of the masterpieces of fine art within the reach of the Irish people of all classes so that they may have increased opportunity of studying such masterpieces and of acquiring a fuller and wider knowledge thereof, and (b) In the course of a long life I have had many opportunities of observing the extent to which the most highly instructed and capable persons have their efficiency defeated and their influence limited for want of any organized instruction and training for the personal contacts whether with individuals or popular audiences without which their knowledge is incommunicable (except through books) and how the authority which their abilities should give them is made derisory by their awkward manners and how their employment in positions for which they have valuable qualifications is made socially impossible by vulgarities of speech and other defects as easily corrigible by teaching and training as simple illiteracy and whereas my experience and observation have convinced me that the lack of such training produces not only much social friction but grave pathological results which seem quite unconnected with it and that social intercourse is a fine art with a technique which everybody can and should acquire."

Sub-clause (ii) of clause 19 began with a reference to the objects which the testatrix asserted that she had at heart. Paragraph (a) of the second sub-clause was an investment clause. Paragraph (b) provided: "The Irish Bank shall pay or apply the net income of the ultimate trust fund in perpetuity to in or towards all or any one or more of the following objects and in such proportions and in such manner as the Irish Bank shall in its absolute discretion from time to time think fit that is to say . . ."

Paragraph (c) followed, and read: "The making of grants contributions and payments to any foundation corporate body institution association or fund now existing or hereafter coming into existence within the special period hereinafter defined having for its object the bringing of the masterpieces of fine art within the reach of the people of Ireland of all classes in their own country provided that no such foundation corporate body institution association or fund shall be eligible as an object of this trust if: (i) It is not of a public character or (ii) In the case of a foundation corporate body institution or association it is at liberty to pay or distribute any profits to or among any

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“ of its members subscribers contributors or benefactors or the
“ fund or any part thereof or any income therefrom may be so
“ paid or applied or (iii) Any of the members subscribers con-
“ tributors or benefactors would have any right to participate in
“ the assets or in the fund in the event of its dissolution or
“ distribution.”

Paragraphs (d) and (e) were in these words: “ (d) The teach-
“ ing promotion and encouragement in Ireland of self control,
“ elocution, oratory, deportment, the arts of personal contact, of
“ social intercourse, and the other arts of public, private, profes-
“ sional and business life. (e) The establishment and endowment
“ within the special period either solely or jointly with any person
“ or persons or any other corporation of any educational institu-
“ tion or any chair or readership in any university college or
“ educational institution now existing or coming into existence
“ within the special period in Ireland for the purpose of giving
“ instruction in or promoting the study by the general public of
“ the subjects mentioned in this clause 19 or of any of them
“ provided that no such college or educational institution has for
“ its sole object the exclusive or complete training in any single
“ profession or calling.”

The third and last sub-clause of clause 19 provided: “ I
“ declare that for the purpose of this my will the expression
“ ‘masterpieces of fine art’ means and includes works of the
“ highest class in the fields of orchestral and classical music
“ painting sculpture fine printing and literature produced or
“ originating not in any one country exclusively but in any
“ country in the world and by or among people in any age period
“ or date whether ancient or modern.”

By clause 20 of the will the “ special period ” was defined as
meaning the lives of the issue then living of his late Majesty
King George the Fifth and the life of the survivor of them and
21 years after the death of the survivor of them.

Clause 21 read: “ Notwithstanding anything herein contained
“ I empower the Irish bank for any of the foregoing purposes or
“ objects in its absolute discretion to expend or lay out the capital
“ of the ultimate trust fund or any part thereof in paying or
“ transferring the same to the trustees or other governing body
“ of any such foundation corporate body institution association
“ fund educational institution . . . university or college as herein-
“ before mentioned either absolutely or by way of loan and if by
“ way of loan either at such rate of interest as the Irish bank shall
“ think fit or without charging any interest.”

Clause 22 of the will placed certain restrictions on the activities of the Irish bank as the trustees, and prohibited the use of the fund in erecting new buildings. Finally, clause 23 defined the expression "Ireland" wherever used in the will as denoting the existing Irish Free State and any other future extension of it that might take place.

The present summons was taken out by the surviving general trustee, the National Provincial Bank Ltd., against the "Irish Bank"; the Public Trustee, as legal personal representative of the testatrix's husband; Cecily Charlotte Colthurst, the testatrix's niece; and the Attorney-General as defendants.

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K. J. T. Elphinstone for the plaintiffs.

Charles Russell K.C. and *Michael Browne* for the National City Bank Ltd. (the "Irish Bank").

Wilfrid Hunt for the Public Trustee, the legal personal representative of the testatrix's husband.

Pascoe Hayward K.C. and *John Monckton* for Mrs. Cecily Charlotte Colthurst, the testatrix's niece.

Denys Buckley for the Attorney-General.

VAISEY J. The long and short of this problem is this: Can I extract from this welter of words the intention of promoting the education of Irish men and women and children to be better citizens in the various departments of secular life, or has the verbosity of the testatrix vitiated her good intentions by including objects which are either too vague or too fanciful to be made effective? It is paragraph (d) of the second sub-clause of clause 19 which gives me most difficulty: "The teaching, promotion" and encouragement in Ireland of self control, elocution, oratory, "deportment, the arts of personal contact, of social intercourse, "and the other arts of public, private, professional and business "life."

It was suggested in argument that the purposes which the testatrix had in mind were those of a sort of finishing school for the Irish people and, on the whole, I think that that is the right view to take. Clause 19 of the will provides excellent material for the allocation of a somewhat pragmatical headmistress at an annual speech day, or other ceremonial occasion, with its judicious admixture of criticism of awkward manners and vulgarities of speech, and admonitions to a higher degree of self control and improved deportment. Indeed, there is, in my judgment, nothing in clause 19 of the will which lies outside the purely secular

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curriculum of an educational establishment of a somewhat pedantic and precious type.

How the people of Ireland will react to such intensive treatment as the testatrix appears to envisage I ought not to speculate, nor am I concerned to consider how far its application to them will be considered to be, or be in fact, beneficial. The court ought not to weigh the respective merits of particular educational methods; it will suffice if the purposes are genuinely educational in their aim and scope. In clause 19 there are obviously many ways in which the trust income could be usefully applied, within the terms there laid down, and it is not, in my view, admissible to test the matter by presupposing perverse and unreasonable methods of applying it, as, for example, the method of devoting it entirely to the teaching and encouragement of "deportment," though, after all, that word means nothing except "manners," however much its significance may have been debased by its connexion with the character of Mr. Turveydrop in Bleak House, in which the word is usually printed with a capital "D."

Certain cases have been cited to me from which I have obtained a good deal of assistance. The first was *Re De Noailles*,¹ a decision of Eve J., and some of his observations are relevant to this kind of problem. He said²: "Here again I think that one must have regard to the main object of education. I know that there are a large number of purists who tell you that the only object of education is to get information, but that is a class of person who I think might be asked what is the use of information unless you turn it to some practical use. The mere stuffing of information into a boy or girl may make them very priggish, but it does not make them of much use in life, unless they know how to apply that information for the purpose of becoming useful citizens. Having regard to the course of education that is contemplated here"—in the will in that case—"and remembering always that these are persons who will have to fight their way through life, and that one condition is that otherwise they will have to pay for their education without assistance, I cannot help thinking that, having regard to these points, it is abundantly necessary, in order put the privileges of education within the grasp of those who will be educated at this institution, that there should be conferred upon those who are responsible for its management a power to see

¹ (1916) 114 L.T. 1089.

² *Ibid.* 1094.

"that the education is completed, and completed in the manner
 "and at the place where it could be completed most advantageously."

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My attention was next called to *In re Hummeltenberg*,³ which is important from the point of view that it contains certain statements of Russell J. which have recently received clear and strong approval in the House of Lords. The headnote is this: "To be valid a charitable bequest must be for the public benefit, "and the trust must be capable of being administered and "controlled by the court. The opinion of the donor of a gift or "the creator of a trust that the gift or trust is for the public "benefit does not make it so, the matter is one to be determined "by the court on the evidence before it." The passage in the judgment from which the headnote is extracted was concerned with two points. It said that the donor of a gift, or the creator of a trust, is not himself to be the judge of what is charitable or what has the essential quality of being for the benefit of the public, and it further said that the private opinions of the judge who tried the case are equally irrelevant. The judge went on to say,⁴ in the words quoted in the headnote, that that question—namely, the question whether a gift may be operative for the public benefit—was "a question to be answered by the court "by forming an opinion upon the evidence before it."

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It was obvious in the particular case of *In re Hummeltenberg*,³ where the trust was for the establishment of a college for the training of spiritualistic mediums, that evidence was required, because of the unfamiliarity of the subject. But there are many cases on this question of whether a bequest is "charitable" or "non-charitable" where the purpose is so obviously beneficial to the community that to ask for evidence would really be quite absurd, and when once it is found that there is a trust of an educational character, that is to say for completing, in the words of Eve J. in *Re De Noailles*,⁵ an education which is already partial but incomplete, the matter speaks for itself. I think that the main object of the testatrix, as expressed by her at such great length, and in such great detail, is really to promote education and to improve, both for their own benefit and for that of the community in which they live, the personal qualities and characteristics of Irish men and women, in their training to be better citizens in the various

³ [1923] 1 Ch. 237.⁵ 114 L.T. 1089, 1094.⁴ *Ibid.* 242.

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a master or mistress in class. I think "education" includes in the terms of that sub-clause to which I have already alluded, not only teaching, but the promotion or encouragement of these arts and graces of life which are, after all, perhaps the finest and best part of the human character.

There is reference to the arts of personal contact, of social intercourse, and the other arts of public, private, professional and business life. I read the words "the other arts" as being ejusdem generis; that is to say, arts of the same sort and kind as the arts and graces of personal contact and of social intercourse; in other words, teaching people how to behave better. That does not apply only to one particular country—not in Ireland any more than England, and not in England any more than Ireland. Those kinds of arts and graces need to be taught and they should be taught.

Whatever may be my own personal views about this type of education, they have nothing to do with the case. It is education of a desirable sort, and which, if corrected and augmented and amplified by other kinds of teaching and instruction, might have most beneficial results.

The testatrix has possibly kept herself by a rather narrow margin within the necessary limits. If she had said less, perhaps it would have been easier to discover her meaning; but I am prepared to declare that the trusts in question are valid charitable trusts under English law.

Declaration accordingly.

Solicitors: *Lawrence, Graham & Co.; Young, Jackson, Beard & King; J. N. Mason & Co.; The Treasury Solicitor.*

I. G. R. M.

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Nov. 12,
13, 28.

[1950 A. No. 275.]

Rating—Water rate for motor-cars—Imposed on persons registered in respect of road fund licences—Imposition irrespective of demand—Validity—Leeds Corporation (Consolidation) Act, 1905 (5 Edw. 7, c. i), s. 24.

Section 24 of the Leeds Corporation (Consolidation) Act, 1905, provides: "The corporation may supply water for other than domestic purposes on such terms and conditions as the corporation

think fit and may supply water by measure either for domestic or other purposes and may if they think fit enter into agreements with respect to any such supply to any person and the moneys payable for the supply of water under this section shall be recoverable in the same manner as water rates. . . ."

The defendant corporation levied a water rate of 3s. a quarter or any less period of a year on every person registered with them (in their position as local taxation authority) as possessing one or more motor-cars in respect of which a current road fund licence was in force. A demand note was sent for the charge every quarter, notwithstanding the fact that a person had not asked for or been supplied with water for non-domestic purposes. A person who wished to satisfy the corporation that he did not use any of their water in connexion with his motor-car was normally obliged to sign a declaration on a printed form to the effect that he claimed exemption from the charge. On an action brought to test the validity of the rate:—

Held, that while the method of raising the rate might be open to improvement, its imposition was within the powers of the corporation under section 24 of the Act of 1905, and it was not, therefore, invalid.

ACTION.

This action was brought by the Attorney-General on the relation of the proprietors of the Royal Automobile Club, in which the court was asked to grant an injunction to restrain the Leeds Corporation from levying a water rate of 3s. on every owner of a motor-car in respect of which a current road licence was in force, whether or not the person had demanded a supply of water for non-domestic purposes. The relators alleged that the rate was ultra vires of the corporation.

The facts are stated in the judgment.

Sir Andrew Clark K.C. and *Norman Skelhorn* for the relators. This case turns upon the construction of the Leeds Corporation (Consolidation) Act, 1905. Under section 21 of that Act¹ the

¹ Leeds Corporation (Consolidation) Act, 1905, s. 20: "The corporation shall at the request of the owner or occupier of any dwelling-house . . . or of any person who under the provisions of this Act shall be entitled to demand a supply of water for domestic purposes furnish . . . a sufficient supply of water for domestic use . . ." at specified rates.

S. 21: ". . . a supply of water for domestic purposes shall not include a supply of water for washing any carriages."

S. 24 (which was the material section in this action) provided: "The corporation may supply water for other than domestic purposes on such terms and conditions as the corporation think fit and may supply water by measure either for domestic or other purposes and may if they think fit enter into agreements with respect to any such supply to any person and the moneys payable for the supply of water under this section shall be recoverable in the same manner as water rates."

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use of water to wash cars is not a domestic purpose. The use of water from a domestic supply for washing a car would be an offence. The effect of the Act is that, (1) the corporation can make such charge as they think fit for a supply of water for washing cars, (2) they cannot charge for the use for washing cars of water supplied for other purposes, (3) they can only charge for water used for washing cars where they in fact supply water for that particular purpose. The corporation levy the water rate for cars on all persons owning cars in respect of which a current road fund licence is in force, whether or not such persons have asked for a supply of water for non-domestic purposes. A person is obliged to pay the water rate unless he can satisfy the corporation that none of their water is used in connexion with his car. The corporation are seeking to levy taxes on the basis that a man is guilty until he is found innocent. It is a method which amounts to an extortion.

The procedure adopted by the corporation is not within the authority to charge given by the Leeds Corporation (Consolidation) Act, 1905, under which the corporation are the water undertakers for the district. The corporation assume that a car owner will use their water on his car. The Act of 1905 does not permit the levy of a water rate on persons who have not asked to be supplied with water. To justify a charge for the use of water to wash a car, (1) there must be a supply for that particular purpose, and (2) the recipient of that supply must have requested, required or used it. The Act is one giving the corporation special powers to collect revenue and (like a taxing statute) it must be construed strictly against the corporation: see *Metropolitan Water Board v. New River Co.*²

The relevant statutory powers are contained in the Act of 1905. That Act by section 5 incorporates a number of general Acts, including the Waterworks Clauses Act, 1847 (with certain exceptions which are not material), and the Waterworks Clauses Act, 1863. [They referred to sections 3, 68 and 74 of the Act of 1847, sections 12 and 18 of the Act of 1863 and sections 5, 7, 20, 21, 24 and 25 of the Act of 1905.]

The material section in this case is section 24, under which this rate is levied. But the method of imposing it on persons who have not demanded it is ultra vires.

Upjohn K.C. and *Denys Buckley* for the corporation. The word "extortion" should not be used here, where the question

² (1904) 20 T.L.R. 687, 689, 690.

is one of the construction of an Act. The corporation were admittedly acting bona fide. There was nothing unlawful in the procedure adopted. It is not necessary that a request should be made for a supply of water. If a person has a car, it is a fair presumption that water is used in connexion with it. If water is not used, the owner can easily obtain exemption from the water rate. He need not pay and leave the corporation to recover the charge if they can. The only alternative method of raising a water rate for the water used on cars would involve a large body of inspectors to see that water was not being misused and that persons using it were in fact paying for it. That would be highly disagreeable and very costly. If an assessment be wrong, it can be altered. The fact that wrong assessments may be made does not mean that the method of assessment is ultra vires.

There is nothing in section 24 of the Act of 1905 which requires a supply of water to be connected to any premises; the powers of that section are extremely wide, and the corporation are not doing anything which is not permitted by section 24. That section really means that if water is made available for a particular purpose (in this instance it is for use in connexion with cars), those availing themselves of it must pay for it. It is immaterial whether the owner of the car uses the water himself or whether he procures its use by some other person, such as a servant or contractor or friend. No question of a breach of a statutory duty or public wrong arises here.

Sir Andrew Clark K.C. in reply. A supply of water under section 24 must be a supply of water to some person; there must be a request for a supply of water under section 24 just as much as under section 20. There must be a recipient of the water who can be identified or who is identifiable. But if the water is used, for example, on a person's car by different garage proprietors (who are not assessed to this rate), that would not be so. If the charge is not authorized by section 24, it is ultra vires.

Nov. 28. VAISEY J. read the following judgment:—The plaintiff in this action is the Attorney-General suing on the relation of Automobile Proprietary Ltd., the owner of the Royal Automobile Club. It is not joined as a co-plaintiff, but it owns and pays rates in respect of premises known as Post Office House, Infirmary Street, in the city and county of Leeds. The defendants are the corporation for that city and county, and are, by virtue of the Leeds Corporation (Consolidation) Act, 1905, constituted the water undertakers for the city and county.

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The question arising in this case is whether the defendants are exceeding their statutory powers as such water undertakers. Those powers are contained in, and conferred by, the Leeds Corporation (Consolidation) Act, 1905, to which I will refer as the "special Act." It is a comprehensive statute of which only very small parts affect the present question. Section 5 of the special Act incorporates with it certain general Acts, including, in particular, the Waterworks Clauses Act, 1847 (with certain immaterial exceptions), and the whole of the Waterworks Clauses Act, 1863.

It will be convenient to interpose a reference to the relevant sections of the general Acts. Section 3 of the Act of 1847 defines "water rate" as including any rent, reward or payment to be made to the undertakers for a supply of water. Section 68 of the same Act is in the following terms: "The water rates, except "as hereinafter and in the special Act mentioned, shall be paid "by and be recoverable from the person requiring, receiving, or "using the supply of water, and shall be payable according to "the annual value of the tenement supplied with water, and if "any dispute arise as to such value the same shall be determined "by two justices."

Section 74, so far as material, provides: "If any person "supplied with water by the undertakers, or liable as herein or "in the special Act provided to pay the water rate, neglect to "pay such water rate at any of the said times of payment thereof "the undertakers may stop the water from flowing into the "premises in respect of which such rate is payable, by cutting "off the pipe to such premises, or by such means as the under- "takers shall think fit, and may recover the rate" in the manner therein mentioned.

Two sections of the Act of 1863 are material, namely, sections 12 and 18. By section 12: "A supply of water for domestic "purposes shall not include a supply of water for cattle, or for "horses, or for washing carriages where such horses or carriages "are kept for sale or hire or by a common carrier, or a supply for "any trade, manufacture, or business, or for watering gardens, or "for fountains, or for any ornamental purpose." By section 18: "If any person—first, not having from the undertakers a supply "of water for other than domestic purposes, uses, for other than "domestic purposes, any water supplied to him by the under- "takers; or secondly, having from the undertakers a supply of "water for any other than domestic purposes, uses, for any "purposes other than those for which he is entitled to use the

“ same, any water supplied to him by the undertakers,—he shall
 “ for every such offence be liable to a penalty not exceeding 40s.,
 “ without prejudice to the right of the undertakers to recover
 “ from him the value of the water misused.”

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Reverting to the special Act, I think that sections 20, 21, 22, 24 and 25 are the only material ones for the present purpose. Section 20 provides: “ The corporation shall at the request of the
 “ owner or occupier of any dwelling-house or part of a dwelling-
 “ house in any street in which any pipe of the corporation shall
 “ be laid or of any person who under the provisions of this Act
 “ shall be entitled to demand a supply of water for domestic
 “ purposes furnish to such owner or occupier or other person a
 “ sufficient supply of water for domestic use at the rates not
 “ exceeding those hereinafter specified.” The percentages are
 enumerated in the section, and I note that in the second proviso
 to that section a reference is made to the supply of “ premises ”
 with water.

By section 21: “ In addition to the purposes set out in
 “ section 12 of the Waterworks Clauses Act, 1863, a supply of
 “ water for domestic purposes shall not include a supply of water
 “ for washing any carriages.” That is contrary to the decision
 in *Harrogate Corporation v. Mackay*.³ Section 22 refers to a
 “ house ” being supplied with water, and I venture to pose the
 question: If a house, why not a car?

Section 24 provides: “ The corporation may supply water for
 “ other than domestic purposes on such terms and conditions
 “ as the corporation think fit and may supply water by measure
 “ either for domestic or other purposes and may if they think fit
 “ enter into agreements with respect to any such supply to any
 “ person and the moneys payable for the supply of water under
 “ this section shall be recoverable in the same manner as water
 “ rates: Provided always that no person shall be entitled to a
 “ supply of water for other than domestic purposes if such supply
 “ would interfere with the sufficiency of the supply of water for
 “ domestic purposes.”

By section 25: “ It shall be lawful for the corporation to enter
 “ into contracts with the owner of any tenement or hereditament
 “ situate in the neighbourhood of any water main or pipe of the
 “ corporation though not within the water limits and also with
 “ any local authority or company not within such water limits to
 “ take and use the water of the corporation upon such terms and

³ [1907] 2 K.B. 611.

VAISEY J. 1951 " conditions and for such period as may be agreed upon between
 " them: Provided always that the corporation shall not supply
 " water under any contract if and so long as their doing so would
 " prevent them from giving throughout the water limits a suffi-
 " cient supply for domestic purposes."

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The facts of the case are not in dispute. Two resolutions of the corporation passed in the years 1926 and 1935 respectively provide that the water charges for motor-cars and tri-cars are to be 3s. for any quarter or less part of a year for which an excise licence is in force in respect of a car. The procedure which has been adopted to give effect to those resolutions is set out in an agreed statement. What the defendants do is to levy a water charge, in addition to the water rate, if any, payable for the ordinary water supply for domestic purposes, on every person registered in Leeds as being the possessor of one or more motor-cars (including tri-cars) in respect of which a current road fund licence is in force, which person is referred to in the statement as the registered owner. They do this notwithstanding the fact that the person charged has made no request for a supply of water for non-domestic purposes.

The process of levying such water charge is as follows: early in each quarter a demand note is sent to each registered owner demanding payment in respect of that quarter of the total water charges claimed from that person, whether for domestic or for non-domestic supplies. The demand note gives details of the charges, showing the separate items of which the total charge is composed, and it shows a charge of 3s. in respect of each motor-car of which a person is the registered owner.

On the first occasion on which a demand note is sent to a registered owner claiming a water charge in respect of a motor-car a printed slip is attached: it is worded as follows: " A supply
 " of water for any purposes in connexion with a motor-vehicle,
 " including a tri-car, is not a domestic use. Therefore, where
 " water from the Leeds Corporation supply is used for this
 " purpose a charge of 3s. is payable for each quarter or less part
 " of a year during which an excise licence is in force. The
 " registered owner is liable whether the water is used by him or
 " on his behalf (by a proprietor of a public garage or any other
 " person) and wherever the vehicle is kept. An allowance will
 " be made upon application in writing in respect of each complete
 " quarter that a vehicle is not licensed."

If, on receipt of the demand note, the registered owner claims, and satisfies the defendants, that no water supplied by them is,

or will be, used by him, or on his behalf, for any purpose in connexion with any motor-vehicles registered in his name, either at any public or private garage or at any address within the city's waterworks undertaking (area of supply), the defendants withdraw the charge. For this purpose the defendants treat water used at a public garage for the purpose of washing the registered owner's motor-car as being used on his behalf, notwithstanding the fact that the motor-car is washed by the proprietor or his servant by virtue of a contract with the registered owner and as an independent contractor, and, save in so far as he himself may be a registered owner, no charge is imposed on the proprietor of such public garage to whom water is supplied for use on motor-vehicles unless the proprietor has elected to be provided with a metered supply.

If a registered owner wishes to satisfy the defendants that no water is, or will be, used by him or on his behalf, he is normally required to complete and sign a declaration in a printed form supplied to the registered owner if and when he claims exemption from the charge, and unless the form is returned duly completed and signed by the registered owner (or, occasionally, when the registered owner otherwise satisfies the defendants that no water is, or will be, thus used), the defendants refuse to withdraw their claim to the charge. If, on receipt of the demand note, the registered owner claims, and satisfies the defendants, that the only water supplied by them which is, or will be, used for any purposes in connexion with his car is supplied by meter and therefore separately paid for, the defendants withdraw the charge.

It appears that the defendants have levied the water charge indiscriminately on every person registered with them in their capacity of local taxation authority as being the possessor of a motor-car in respect of which an excise licence is in force, although that person may neither have asked for, nor been furnished with, a supply of water for purposes other than domestic purposes. I am told that the number of such cars is about 20,000. The only use that can be made of any appreciable quantity of water in connexion with a motor-car is for washing it, for the amount of water poured into the radiator of a car is so small as to be negligible. It is to be noted that the defendants' charge in respect of a steam wagon, which is not only washed but has water put into its boiler, is 30s. and not 3s. a quarter. The defendants have proceeded on the assumption that if a car is registered as ordinarily kept at an address in Leeds it follows, not necessarily, but as a matter of strong probability, that it will

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be washed on one or more occasions in each quarter with the corporation's water, and that the probability is so strong as to justify them in requiring its owner to sustain the burden of establishing the contrary.

I do not like the principle of levying a charge on the citizens of Leeds and then requiring them to disprove, if they can, the propriety of it; nor do I like the use which is being made of the records in the possession of the corporation as the local taxation authority to enable them to enforce their claims as water undertakers; nor do I think that their efforts to avoid unfair and unjustified charges have been particularly adroit. I also dislike very much the favour accorded to public garages, in which a large quantity of water must be used for washing cars, not only cars registered in Leeds, but those of various kinds belonging to visitors to the city and remaining there for varying periods. I do not, however, think that the defendants have failed to do their best to avoid making improper and unjustified charges, but I also think that there is no doubt that a ratepayer will often prefer to pay this small charge than to challenge it, and that is a state of affairs which is undesirable, and ought not to be allowed to occur.

The defendants claim that their method is the only way in which they can charge for water which is used for car washing, any alternative involving the employment of a large number of inspectors to see that the water is not being misused. But, whether I like or dislike their methods, the sole question is whether the defendants are justified in what they are doing by the very wide and comprehensive terms of section 24 of the special Act, which authorizes them to supply water for other than domestic purposes on such terms and conditions as they think fit, having regard to the differences between the language of that section and that of the other sections to which I have referred.

It is suggested that a supply of water presupposes and requires that there should be a recipient of the supply who can be identified, and that the supply of water can only be given and charged for where the recipient of the supply is identified, or identifiable, and it is pointed out that in a special Act of Parliament the powers must be construed somewhat strictly: *per* Lord Macnaghten in *Metropolitan Water Board v. New River Co.*⁴ The opposing argument is that water may be supplied for a particular purpose (in this case, car washing), and if it is made available for that purpose to those who desire either to use it, or to procure that it

⁴ 20 T.L.R. 687, 689, 690.

shall be used for that purpose, that it matters not whether the water leaves the corporation's mains and reaches the owner's car by the action or instrumentality of himself, or his agent, or a contractor, or a friend or otherwise, or what is the source from which it happens to emerge from the defendants' reservoirs or mains.

It is said, therefore, that the payment of the quarterly 3s. makes the car, as it were, free of the corporation's water from whatsoever tap or standpipe or hydrant it may be drawn. Treating the citizens of Leeds as a sort of family party and the city of Leeds as a collection of taps, standpipes and hydrants, the arrangement may be regarded as giving permission to those members of the family who have paid the water charge to have their cars washed with the city's water. I think that on the whole this view of the section is right, and while I also think that the procedure is not incapable of some improvement, I hold that this action fails and must be dismissed.

Action dismissed.

Solicitors: *Clifford-Turner & Co.; Sharpe, Pritchard & Co., for the Town Clerk, Leeds.*

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[1949 M. 4089]

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5, 19.

National Health Service—Vesting of voluntary hospitals—Minister of Health—Premises held for Home for Incurables at Vesting Date—Trustees authorized by trust deed to sell premises and apply proceeds to other charitable purposes—Whether premises used solely for purposes of the Home—National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81), s. 6 (1).

Evershed M.R.,
Birkett and
Romer L.JJ.

For the purpose of deciding whether premises held by trustees upon trust for sale and used for the purposes of a voluntary hospital are interests held by trustees "solely for the purposes of that "hospital" within the meaning of section 6 (1) of the National Health Service Act, 1946, so as to vest in the Minister of Health on the appointed day, the question to be asked and answered is: "On that day, for what purposes did the trustees hold the land?" Where the answer is, "For the purposes of the voluntary

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"hospital and no other," then the premises vested in the Minister of Health on that day.

If, for example, premises were held on July 4, 1948, for the purpose of providing hospital services to men wounded in the Second World War and, upon exhaustion of that purpose (as must necessarily happen in a relatively short time), upon trust for some educational purpose, an answer to the question which referred only to the former purpose and neglected to make any reference to the latter would not satisfy the ordinary requirements of common sense or accuracy.

But it cannot affect the answer to the question in this case that in the trust deed in the present case there is a remote remainder in favour of other charitable purposes upon the contingency of the voluntary hospital ceasing to continue or that under the trust deed there is a provision enabling the income of the invested proceeds of sale to be applied in payment of pensions.

Decision of Wynn-Parry J. affirmed.

Decision of Wynn-Parry J. in *Minister of Health v. Fox* [1950] Ch. 369 approved although the grounds of the judgment went further than was required.

APPEAL from Wynn-Parry J.

By a trust deed dated June 27, 1884, made between William Marjoribanks, James Lancaster Ranking and George Radcliffe of the first part, William Henry Baron Leigh and others of the second part, and the said William Henry Baron Leigh and others of the third part, it was recited (1) that an institution known as the Midland Counties Home for Incurables (thereinafter and hereinafter called the Home) had been carried on and was then carried on under rules of which a copy was set out in the First Schedule, and the expression "the rules" thereafter used meant "the said rules or other the regulations for the time being validly enacted"; (2) that considerable sums of money had been contributed for carrying on and extending the Home; (3) that part of these sums had been expended in the purchase of land at Leamington Priors called Arboretum; (4) that these lands had been conveyed to the parties of the first part and it was intended that the same should be held by trustees called the general trustees upon the trusts thereafter mentioned; and (5) that it was the intention of donors and subscribers that such of the money given as had not been invested in lands and buildings might be used for the general purposes of the Home and be held by trustees, called the endowment trustees, upon the trusts thereafter declared. The parties of the first part then conveyed the Arboretum to the parties of the second part, as the first general trustees, in fee simple, and conveyed all furniture and

property in and about the same to the parties of the second part absolutely upon trust, if authorized by a resolution of the committee, to sell any part or parts (not being the main building used for patients of the Home) of the said land, buildings, furniture and premises, and upon trust, if authorized by a resolution of the subscribers, to sell the whole or any part whatsoever of the said lands, buildings, furniture and premises for the time being subject to the trusts of these presents, and in the meantime to permit the same to be used for the purposes of the Home in accordance with the rules. And it was thereby declared that the proceeds of any such sale made under the authority of a resolution of the committee should be paid to the endowment trustees or applied to any purpose for which the endowment fund might be lawfully applied. And it was provided that the parties of the third part should stand possessed of the money paid or to be paid to them upon trust that the endowment trustees should invest such money and pay the income to the treasurer or such other person as might be appointed by resolution of the committee, and further that, if and when a resolution of the committee confirmed by a resolution of the subscribers should be passed to the effect that by reason of insufficiency of funds or for any other reason the Home should be closed, the endowment trustees were to hold the trust fund then in their hands (including the proceeds of sale of the lands, buildings and other property) upon such trusts in favour of or for the benefit of charitable objects in the Midland Counties or some of them as might be directed by any scheme proposed and passed by a resolution of the committee and confirmed by a resolution of the subscribers or in default as therein directed.

Since the date of the deed the rules had been in some respects altered, and rule 2 provided: "The object shall be to give relief "by admission to the Home or by pensions as hereinafter provided, to persons of good character, of limited or reduced "income, who are suffering from incurable or chronic diseases, "or incapacity owing to injury or wounds."

By a deed dated September 23, 1927, the defendants, Lloyds Bank Ltd., were appointed both the general trustees and the endowment trustees.

Immediately before July 5, 1948, all the property vested in the bank formed part of or was used for the purposes of the Home. It was claimed by the Ministry of Health that the Home was a hospital within the meaning of the National Health Service Act, 1946, and that the premises forming part of or used for the

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purposes of the Home vested in the Minister of Health by virtue of section 6 of the Act.

On November 23, 1949, the plaintiff Frankland, suing on behalf of himself and all other members of the general committee of the Home, took out a summons for the determination whether upon the true construction of the trust deed and of the National Health Service Act, 1946, the premises forming part of or used for the purposes of the Home immediately before July 5, 1948, were on that date transferred to and vested in the Minister of Health by virtue of section 6 of the Act.¹

Wynn-Parry J. held, adopting a passage from his own judgment in *Minister of Health v. Fox*,² that he was driven to the conclusion that in section 6 (1) of the Act of 1946 the phrase held by trustees "solely for the purposes of that hospital" bore the construction for which the Minister contended, and that it was not directed to pursuing the inquiry what were the exact terms of the trust deed with a view to discovering whether the trustees had power to divert the use of the property to other purposes.

The plaintiff appealed.

Charles Russell K.C. and *H. E. Francis* for the plaintiff. This appeal involves the construction of section 6 of the National Health Service Act, 1946. The question is whether the legal

¹ National Health Service Act, 1946, s. 6: "(1) Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises . . . of a voluntary hospital, and in equipment, furniture or other movable property used in or in connexion with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the busi-

ness of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section."

"(4) All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day. . . ."

Section 7 provides: "(4) All endowments of a voluntary hospital to which the last foregoing section applies, other than a hospital to which the foregoing provisions of this section apply, being endowments held immediately before the appointed day, shall on that day be transferred to and vest in the Minister by virtue of this Act free of any trust existing immediately before that day. . . ."

² [1950] Ch. 369, 377.

estate in this hospital vested under section 6 in the Minister of Health on the appointed day on the general ground that it was then held on trust by the trustees, Lloyds Bank Ltd., solely for the purposes of a hospital.

It is contended that (1) the decision of Wynn-Parry J. in *Minister of Health v. Fox*,³ by which he felt himself bound, was wrongly decided, and (2) that decision is in any event distinguishable on the facts of this case.

The effect of the decision in *Minister of Health v. Fox*³ is that if premises are in fact used for hospital purposes on the appointed day they vest in the Minister however temporary that user may have been intended to be. It is submitted that future trusts cannot be ignored. It is for the Minister to satisfy the court that the premises were used on the appointed day "solely" for the purposes of a hospital. Both in the *Fox* case³ and in this case it is not true to say that the premises were solely used for the purposes of a hospital. It is only possible to say for what purposes the premises were then used by looking at the trust deed which lays down the trusts on which the trustees are to hold the property. The learned judge was wrong in holding that it was not the trusts which determined the matter, but the actual physical user of the property on the appointed day.

Secondly, it is contended that this case is distinguishable from *Minister of Health v. Fox*³ because here the premises were held on an immediate binding trust for sale. In that case the trustees had merely a power of sale.

H. E. Francis following. These premises were only held upon trust for hospital purposes until sale. It is submitted that in any event all that vested in the Minister was the right to use the premises as a hospital until the trustees sold under the trust for sale. Immediately on sale the proceeds of sale would become subject to the trusts of the trust deed.

Sir Lynn Ungood-Thomas K.C. and *Denys Buckley* for the first respondent, the Ministry of Health. In so far as money subscribed was invested in land, the rules scheduled to the trust deed contemplated the use of the income of the proceeds of sale for personal relief at the Home. The rules related to the objects of the Home and regulations affecting the same. Any new rules were to be "made binding for the government of the Home." It is not known how the new rules came to be made, but it is

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³ [1950] Ch. 369.

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submitted that the provision for paying pensions was not within the ambit of what was contemplated. The whole conception of the trust deed and the rules was that everything comprised in the trust deed was to be for the purposes of the Home unless the Home came ultimately to be brought to an end. There was only to be a Home for patients and not a society for paying pensions.

Again, the trust for sale was not an immediate binding trust for sale. The land was to continue unconverted unless there was a direction to sell; but on the contrary view there would be an implied power to postpone sale under section 205 of the Law of Property Act, 1925. [They referred to *Duke of Marlborough v. Attorney-General*.⁴] This case is indistinguishable from *Minister of Health v. Fox*.⁵ The controlling consideration here was that the land held under the trust deed was to be used for the Home with the possibility of a sale becoming necessary later if the Home ceased to exist.

In view of these considerations it seems clear that section 6 (1) of the Act of 1946 applied to vest the land in the Minister of Health on the appointed day as being an interest held immediately before that date by trustees "solely for the purposes of" the Home. The words are not "solely on trusts for that "hospital." The effect would be the same if the arguments on the construction of the trust deed are not accepted. The language of section 6 (1) is such that regard can only be had to the purposes for which the land was held on the specified date, and any subsequent trusts are immaterial, as was held in *Minister of Health v. Fox*.⁵ Under section 6 (4) all property transferred to the Minister under that section "shall vest in him "free of any trust existing immediately before the appointed "day." [They referred also to section 6 (5) and section 7 (9).] Under section 6 (1) what is to be vested in the Minister of Health is interests held by trustees solely for the purposes of a voluntary hospital and no reference is made to successive trusts. It cannot be said that for the subsection to apply the interests must be held in perpetuity solely for the purposes of the hospital. The language of section 6 (1) puts it beyond doubt that regard is to be had only to the position on the specified day.

Raymond Walton for the second respondent, Lloyds Bank Ltd.

Charles Russell K.C. in reply.

Cur. adv. vult.

⁴ [1945] Ch. 145.

⁵ [1950] Ch. 369.

December 19. EVERSLED M.R. The judgment I am about to read is the judgment of the court.

The question raised by the present proceedings is whether a few words in section 6 (1) of the National Health Service Act, 1946—"interests held immediately before 'July 5, 1948,' by "... trustees solely for the purposes of that hospital"—upon their true interpretation apply so as to have vested in the Minister of Health on the date mentioned (being the appointed day within the meaning of the Act) certain land previously and (if the order under appeal be wrong) still vested in the second defendant, Lloyds Bank Ltd., which land has for some two generations been the site of an institution in Leamington known as the Royal Midland Counties Home for Incurables. Wynn-Parry J. held that it had so vested. He followed his own previous decision in *Minister of Health v. Fox*,⁶ in which case he had based his conclusion on the view that the words we have quoted were to be construed exclusively by reference to the user to which the land in question was in fact being put on July 4, 1948, and without reference to any "purposes" or trusts which might at any future date become operative by virtue of the deed or deeds of trust affecting the land or otherwise.

The bank has maintained a passive attitude in the proceedings, but the plaintiff sues on behalf of the committee of management of the Home established by the indenture of June 27, 1884, in which the action is intituled and by which the land in suit was conveyed to the predecessors in title of the defendant bank; and he now appeals to this court against the judgment and order of Wynn-Parry J. In the court below the plaintiff was (by reason of the earlier decision of the same judge) constrained to limit his argument to an attempt to distinguish the present case upon the facts from *Fox's* case.⁶ In this court Mr. Russell and Mr. Francis, on the plaintiff's behalf, have, more boldly, challenged the validity of the reasoning on which *Fox's* case⁶ is based. The burden of their case is that section 6 (1) of the Act of 1946 has no application to a case (such as the present and that of *Fox's* case⁶) where upon reference to the relevant trust deed it appears that trusts exclusively limited to the purposes of the particular institution are not the only trusts which the deed in all circumstances comprehends.

[His Lordship then stated the material terms of the deed of June 27, 1884.]

⁶ [1950] Ch. 369.

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Since the date of the deed the rules, certain of which are set out in the schedule to the deed, have at some date and in some manner not stated in the evidence been in some respects altered. Under the rules in force immediately before the appointed day the second or "objects" clause of the rules was as follows: "The object shall be to give relief by admission to the Home "or by pensions as hereinafter provided, to persons of good "character, of limited or reduced income, who are suffering from "incurable or chronic diseases, or incapacity owing to injury or "wounds," and then there are certain exceptions which need not be referred to.

From the provisions of the deed which we have recited it therefore appears (1) that the income of the invested proceeds of sale of the land in question or any part thereof, if sold, would be applicable (*inter alia*) to the payment of small pensions to persons who, though suffering from some incurable malady, did not receive any kind of medical treatment or services at the Home itself; and in fact some part of the income of the endowment fund mentioned in the deed (to a transfer to himself of which the Minister of Health in fact makes no claim) is now being so applied; and (2) that in the event of the enterprise of the Home ceasing to exist the trust property would be applicable for such other charitable purposes as the trustees for the time being might determine. It is upon these two characteristics that Mr. Russell has hung his argument. Both being comprised within the terms of the deed, neither (says he) can properly be described as "solely for the purposes" of the Home; the second obviously, and the first because the payment of the pensions is wholly distinct from and unconnected with the physical institution of the Home to which alone by reason of the context and the definition of section 79 (1) in the Act the words "that hospital" in the vital phrase in section 6 (1) can be related.

Mr. Russell sought to derive some support for his general argument by reference to the provisions relating to local authority hospitals in section 6 (2) of the Act corresponding to the provisions of section 6 (1) relating to voluntary hospitals. The opening phrases of section 6 (2) differ from those of section 6 (1), but the formula which we are called upon to construe occurs in both; and Mr. Russell drew attention to the fact that section 9 (4) of the Act (which exempts from its operation premises used temporarily by local authorities for hospital purposes) does so by exempting such premises from the term "hospital" and not by reference to the formula in question. In our judgment, these

considerations do not materially assist in the solution of the present problem.

On the other side, Sir Lynn Ungood-Thomas, by way of prelude to his main answer to Mr. Russell, made two submissions particular to the facts of the case, namely (1) that upon a proper view of the terms and intent of the deed there was no trust for sale at all so that consideration of the trusts affecting the proceeds of any sale was irrelevant; and (2) that in any case and contrary to its apparent effect, already noticed, the deed did not permit the application of any part of the capital or income of the proceeds of sale of land towards payment of pensions, such an application not being contemplated or provided by the rules specified in the schedule to the deed. We are unable to accept either of these submissions. As was observed by this court in *Duke of Marlborough v. Attorney-General*,⁷ it is now too late to reverse the direction taken by the courts as regards the conveyancers' technique of the primary trust for sale, and we cannot see any sensible or logical basis for distinguishing the present case from that, e.g., of a disposition of land upon trust for sale if requested by or with the consent of the first tenant for life. And as regards Sir Lynn's second preliminary point, the court must, as it seems to us, assume that the changes in the rules of the Home were validly made and within the amending powers originally conferred. The word "rules" in the deed itself will therefore by definition include the now existing rules. Moreover, the purchase of the site of the Home did not absorb the whole of the sums originally subscribed—the balance being employed to establish the endowment fund.

The matter then turns upon the proper application of the few and simple words—"being interests held immediately before the "appointed day . . . by trustees solely for the purposes of that "hospital"—to the premises of the Royal Midland Counties Home for Incurables then subject to the trusts of the deed of 1884, which we have, so far as material, construed. The arguments have presented us with a choice between two extreme views. And each has itself—quite properly—been subjected to the test of extreme cases with a view to showing that each, in such cases, tends to unreality or absurdity. Thus it is, in our judgment, the most formidable of the criticisms directed to Wynn-Parry J.'s view as expressed in *Minister of Health v. Fox*⁸ that in a case in which land is held upon trusts for the purposes

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⁷ [1945] Ch. 145.

⁸ [1950] Ch. 369.

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of a hospital for some limited period and thereafter for some other public or private purposes, the effect of the Act would be to destroy those later interests—which would in the case of private interests be equivalent to an expropriation for which no kind of compensation is provided. Moreover, as it seems to us, the view taken in that case by Wynn-Parry J. appears to treat the word “held” as equivalent to “used in fact.” In his judgment, now under appeal, the learned judge, after citing the following passage from his earlier judgment⁹: “In my view, the “sense of this series of provisions is that the court takes its “stand once and for all on before the appointed day and sees “for what purpose the property was being held then, and, if “the property was then being held for purposes of the hospital “and for no other purposes in fact, that is an end of the matter, “and property falling within that description passes under the “subsection to the Minister,” proceeded: “As I have already “observed, it is the fact, and it is not disputed, that at the “appointed day the premises concerned were being used solely “for the purpose of . . . the Home.” On the other hand, the appellant’s argument appears to have (at least) the effect of excluding from the Act altogether every case of hospital land held under the terms of a trust deed which contains any provision directed to the application of the trust property to some other purpose in the possible event of the discontinuance for any reason of the specified “hospital” trust; and unless in looking for the existence of such possibilities it is illegitimate to look outside the express provisions of the relevant trust instrument—notwithstanding the absence of any language in the subsection requiring such a confinement of the search—the exempting effect of the phrase under discussion might well under the doctrine of resulting trust extend to a large proportion of the land held on July 4, 1948, on trust for the purposes of voluntary hospitals.

Neither of the extreme views when so examined and tested appears readily to conform to the intention naturally attributable to Parliament. But, in our judgment, it is unnecessary for the court to choose between the two alternatives presented. The relevant words require, as we think, in each case the simple question to be asked and answered in reference to July 4, 1948, “On that day, for what purposes did the trustees hold the land?” In the present case the proper answer would have been: “For

⁹ [1950] Ch. 369, 377.

“the purposes of the Royal Midland Counties Home for Incur-
 “ables and no other.” In our judgment the answer would be
 plainly in conformity with common sense; nor can we think that
 its faithfulness would in any sense be qualified by the presence
 of the remote remainder in favour of other charitable purposes
 determined by the trustees upon the contingency of the Home
 ceasing to continue or by the provision enabling income of the
 invested proceeds of sale to be applied in payment of pensions:
 for, in our view, the payment of such pensions, though distinct
 from the activities of the Home as a physical entity, is neverthe-
 less fairly to be regarded as a purpose of the Home whether
 regarded from its material or institutional aspect. It is a purpose
 so closely connected with and so much a part of the purposes of
 the Home as such that it must, in our judgment, necessarily
 cease if for any reason the Home itself ceased to exist.

In our judgment a similar question posed in reference to the
 maternity home which was the subject-matter in *Minister of
 Health v. Fox*¹⁰ would have properly obtained a corresponding
 answer. In that case the argument against the Ministry rested
 upon the presence in the deed of conveyance constituting the
 home of clause 3: “The trustees shall apply and deal with all
 “moneys which shall arise from any sale, mortgage or other
 “disposition of the said premises either for the general purposes
 “of the maternity home aforesaid or for such other public
 “charitable purpose and in such manner as the trustees shall
 “think fit.”

Both in this case, therefore, and in *Fox's* case,¹⁰ we think
 that the requirements of the subsection were satisfied at the
 relevant date and that a contrary result would give to the
 material language of the section an altogether unnatural and
 artificial preciseness. As we have said, every case must, in
 accordance with the well-established principle of English law, be
 determined upon its own facts and we find it unnecessary (as it
 might be embarrassing) to attempt any exposition of the terms of
 the subsection that would anticipate the answer in all cases. We
 take one example suggested in the course of the argument, that
 of premises held on trust for the purpose of providing hospital
 services to men wounded in the Second World War and on the
 exhaustion of that purpose (as must necessarily happen in a
 relatively short time) on trust for some educational purpose, the
 premises being in fact used for the former purpose on July 4,

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¹⁰ [1950] Ch. 369.

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1948. In that case an answer to the relevant question which referred only to the former purpose and neglected to make any reference to the latter would, in our judgment, fail to satisfy the ordinary requirements of common sense or accuracy.

We therefore think that Wynn-Parry J. rightly answered the question raised by the present case, and that he rightly concluded the question raised by *Minister of Health v. Fox*¹⁰ though, for the reasons which we have given, we think the grounds of his judgment went further than were required by the answer which he gave, and further than we are prepared ourselves to go.

In our judgment the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Farrer & Co. for Field & Sons, Leamington Spa;*
Solicitor to Ministry of Health; Farrer & Co.

H. C. G.

¹⁰ [1950] Ch. 369.

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Dec. 9.

Danckwerts
and Upjohn JJ.

In re A DEBTOR (No. 41 OF 1951).

Ex parte THE DEBTOR *v.* HUNTER (LIQUIDATOR OF MARVEL
PAPER PRODUCTS LD.).

*Bankruptcy—Proceedings by company in liquidation—Petition and
bankruptcy notice wrong in form—Proceedings invalid.*

A bankruptcy notice requiring a debtor to comply with an order obtained by a liquidator in the winding-up of a company, and a petition founded on the non-compliance with that notice must be entitled in the name of the company in liquidation, and not in the name of the liquidator.

Further, in the bankruptcy notice the liquidator must be described as acting on behalf of the company in liquidation.

In re Winterbottom (1886) 18 Q.B.D. 446; *Re Shirley* (1887) 58 L.T. 237; *In re Bassett* (1895) 2 Mans. 177 and *In re A Debtor, Ex parte the Debtor v. Bowmaker Ltd.* [1951] Ch. 313 followed.

APPEAL from Croydon county court.

An order of February 16, 1951, obtained on an originating summons in the voluntary winding up of a company known as Marvel Paper Products Ltd., ordered a debtor to pay "within four days of the service of this order upon [him] . . . to the applicant . . . Archibald William Hunter as such liquidator"—that was as liquidator of Marvel Paper Products Ltd.—the sum

of money due from him "in respect of the call of £1 per share duly made by the said liquidator on May 2, 1950." The amount was £1,008 3s. 9d., being £1,000 due on call and costs amounting to £8 3s. 9d.

The debtor failed to pay the sum demanded and a bankruptcy notice was served on him by the liquidator on June 5, 1951. That notice was headed "*In re* [The Debtor], *Ex parte* Archibald William Hunter Liquidator of Marvel Paper Products Ltd." In the body of the notice, it was addressed to the debtor, giving his address, and continued: "Take notice that within seven days after service of this notice on you, excluding the day of service, you must pay to Archibald William Hunter Liquidator of Marvel Paper Products Ltd. . . . the sum of £1,050 3s. 9d."—which was the sum directed to be paid by the order of February 16, 1951, with the addition of interest—"claimed by Archibald William Hunter Liquidator of Marvel Paper Products Ltd. as being the amount due on a final order obtained by him against you in the High Court of Justice, Chancery Division, Companies Court, dated February 16, 1951, whereon execution has not been stayed." The notice continued: "or you must secure or compound for the said sum to his satisfaction or to the satisfaction of this court; or you must satisfy this court that you have a counterclaim, set-off, or cross-demand against him which equals or exceeds the sum claimed by him and which you could not set up in the action or other proceedings in which the order was obtained." It was endorsed with the following note: "You are specially to note. That the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you. If, however, you have a counterclaim, set-off, or cross-demand, which equals or exceeds the amount claimed by Archibald William Hunter Liquidator of Marvel Paper Products Ltd. in respect of the order and which you could not set up in the action or other proceedings in which the said order was obtained, you must within three days apply to this court to set aside this notice, by filing with the registrar an affidavit to the above effect." The petition in bankruptcy was headed "*Ex parte* Archibald William Hunter Liquidator of Marvel Paper Products Ltd.," and said that the debtor was justly and truly indebted to him as liquidator of Marvel Paper Products Ltd. in the sum of £1,050 3s. 9d.

The debtor failed to comply with bankruptcy notice, and a receiving order was made against him by the registrar at Croydon

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county court on November 2, 1951. He now appealed against the receiving order.

The debtor, on his appeal against the receiving order, contended that the bankruptcy notice and petition were bad in form since they were entitled in the name of the liquidator and not in the name of the company in liquidation, and were incapable of amendment. This ground was not raised before the registrar, but leave was given for it to be taken on appeal. The other grounds of appeal were not argued having regard to the decision on the first ground.

Muir Hunter for the debtor. The bankruptcy petition and the notice are bad in form, being brought in the name of the liquidator, whereas they should have been brought in the name of the company in liquidation. That has been so since the Companies Act, 1862: see section 95 of the Act. It is established by the authorities that where there is a debt owing to a company in liquidation, the notice and petition are incorrectly entitled unless they are presented in the name of the company in liquidation: see *In re Winterbottom*,¹ *Re Shirley*² and *In re Bassett*.³

The defects in the notice and petition are not defects curable by amendment: see *In re a Debtor, Ex parte the Debtor v. Bowmaker Ltd.*⁴ It is immaterial that no one has been misled; it is sufficient if they could have been misled: *per Harman J.* in *In re a Debtor, Ex parte the Debtor v. Bowmaker Ltd.*⁵

The reference to any set-off or counterclaim in the notice does not state, as it should, that it is against the liquidator as liquidator of the company in liquidation; it is therefore calculated to mislead. No petition may be presented on a notice which is bad in form and calculated to mislead. The receiving order based on the petition should therefore be set aside.

Mark Nesbitt for the liquidator. It is agreed that no one has in fact been misled. The petition and notice are, it is submitted, in the correct form. Where the creditor bringing bankruptcy proceedings is a judgment creditor, the bankruptcy notice is bad unless it follows exactly the form of the order. The decision in the first part of *In re Winterbottom*⁶ supports this proposition. This bankruptcy notice is correct since it follows the form of the order: see *In re Howes*⁷ and *In re a Judgment Debtor*.⁸

¹ (1886) 18 Q.B.D. 446.

² (1887) 58 L.T. 237.

³ (1895) 2 Mans. 177.

⁴ [1951] Ch. 313.

⁵ *Ibid.* 320.

⁶ 18 Q.B.D. 446.

⁷ [1892] 2 Q.B. 628.

⁸ [1908] 2 K.B. 474.

The liquidator is taking proceedings not on behalf of the company but on behalf of the creditors of the company. The reference in the notice to any counterclaim or set-off is not therefore prejudicial in form. [He referred to *In re G. E. B., a Debtor.*⁹]

Alternatively this is a case for amendment under section 147 of the Bankruptcy Act, 1914.

Muir Hunter replied.

DANCKWERTS J. stated the facts and continued:—The first point taken was that the bankruptcy notice and the petition were wrong in form because they were not entitled in the name of Marvel Paper Products Ltd., the company in liquidation, but in the name of Archibald William Hunter, who was merely described as the liquidator of the company in question. That point was not taken in the county court, but on consideration of the circumstances we have allowed Mr. Muir Hunter to take the point before us. There are authorities which are binding on us which establish that where a sum is due to a company in liquidation a bankruptcy notice and a petition are not correctly entitled if they are entitled in the name of the liquidator and not in the name of the company. Those cases are *In re Winterbottom*,¹⁰ *Re Shirley*¹¹ and *In re Bassett*.¹²

In the present case it was claimed that the moneys due in respect of calls which were ordered to be paid by the order of February 16, 1951, were due to the company in liquidation and were only payable to the liquidator, Archibald William Hunter, in his capacity of liquidator as the agent of the company; or as Vaughan Williams L.J. put the matter in *In re Bassett*,¹³ as the collector of the company's assets. Unlike the position of a trustee in bankruptcy, in which case the assets of the debtor vest in the trustee, in the case of a company in liquidation the assets, without a special and unusual order of the court, do not vest in the liquidator at all but remain vested in the company in liquidation. It is plain, therefore, that, on those authorities, the bankruptcy notice and the petition ought to have been presented in the name of the company in liquidation, and not in the name of the liquidator.

It was said by Mr. Nesbitt, however, that there are authorities which show that the bankruptcy notice is bad unless it complies

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⁹ [1903] 2 K.B. 340.

¹⁰ 18 Q.B.D. 446.

¹¹ 58 L.T. 237.

¹² 2 Mans. 177.

¹³ *Ibid.* 181.

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strictly with the form of the judgment upon which it is based. In support of that proposition we were referred to *In re Howes*¹⁴ and *In re a Judgment Debtor*.¹⁵ But on that basis there is a further objection to the bankruptcy notice, namely, that it does not comply with the order of February 16, 1951, which directed payment to Archibald William Hunter as such liquidator, that is to say, as liquidator of the company in liquidation, and that the bankruptcy notice is wrong because it simply requires payment to "Archibald William Hunter Liquidator of Marvel Paper Products Ltd.," and does not make it clear, as in the terms of the order, that payment is only due to him in his capacity as liquidator of the company in liquidation and collector of its assets. So that even on that point the bankruptcy notice is in error. It is also plain that the bankruptcy notice is misleading in that it requires compounding or securing to the satisfaction of Mr. Archibald William Hunter without describing him as acting on behalf of the company, and refers to "a counterclaim, set-off, or cross-demand against him," which is a different matter from a counterclaim, set-off, or cross-demand against or upon a company on whose behalf he may be acting, because any private debt of his would be entirely irrelevant. The bankruptcy notice is therefore open to objection in all those respects, and the petition is likewise open to objection in that it is not entitled in the name of the company in liquidation.

Reference was made by Mr. Nesbitt to section 147 of the Bankruptcy Act, 1914, which provides that mere defects of form are not to invalidate proceedings, and he said that this was a defect which does not, in any sense, cause substantial injustice, and it ought therefore to be disregarded. That seems to me to be disposed of by a number of cases, of which the last was *In re a Debtor, Ex parte the Debtor v. Bowmaker Ltd.*,¹⁶ in which Harman J. and I had to consider that very matter. The distinction is this: it is not necessary to prove that any debtor has actually been misled; it is sufficient if the possibility of his being misled exists. It is clear in the present case that a debtor might have been misled on the subject of set-off or counterclaim, whether in fact he was misled or not, and it has been laid down by the courts again and again that bankruptcy notices are matters of strict form in which defects will be fatal, because they are penal proceedings and closely guarded by the courts. Both the bankruptcy notice and the petition in the present case were bad

¹⁴ [1892] 2 Q.B. 628.

¹⁶ [1951] Ch. 313.

¹⁵ [1908] 2 K.B. 474.

in form, and the proceedings, therefore, for bankruptcy are ineffective, and on that ground the appeal should be allowed.

There were other grounds which were mentioned by Mr. Muir Hunter. It was suggested that the court should reopen the question of the order upon which the whole of the proceedings were based. In the view which we take it is not necessary, nor, indeed, is it proper for us, to go into those further points.

UPJOHN J. I agree. For the reasons given by Danckwerts J. I think that the bankruptcy notice was bad in that it was wrongly entitled; it should have been entitled "*Ex parte* Marvel Paper Products Ltd." It was also bad because the statement "you must satisfy this court that you have a counterclaim, set-off, or cross-demand against him," referring to the liquidator, ought to have referred to him as liquidator of the company. Speaking for myself, with regard to the remaining point taken by Danckwerts J., namely, that the notice was bad because it demanded payment to Archibald William Hunter, liquidator of Marvel Paper Products Ltd., and not to him as liquidator, I should desire to reserve that for further consideration.

As the notice was bad on the other two grounds, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Warren & Co.; Hextall, Erskine & Mudford.*

I. G. R. M.

BUTT v. KELSON AND OTHERS.

C. A.

[1950 B. No. 6163.]

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Dec. 6, 18,
19.

Trusts—Will—Company—Control vested in trustees—Trustees sole directors—No right in beneficiaries to inspect documents held by trustees as directors.

Evershed M.R.,
Birkett and
Romer L.JJ.

The defendants as trustees of a testator's will held 22,100 ordinary shares of a private limited company out of 22,852 shares which had been issued. The voting power was vested in the ordinary shareholders. Pursuant to powers conferred on them by the will of the testator, the defendants had appointed themselves

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to be the sole directors of the company. The plaintiff, who was entitled under the testator's will to a life interest in a substantial portion of the testator's residuary estate, became dissatisfied with the manner in which the defendants had conducted the company's business and in this action claimed a declaration that he, as a person beneficially interested in the property subject to the trusts of the will, was entitled to inspect all documents which came into possession or power of the defendants by virtue of their position as directors of the company.

Harman J. made the declaration for which the plaintiff asked. On appeal:—

Held (1) that beneficiaries were not entitled to call on trustee directors to use their powers as directors as though such powers were held on trust for the beneficiaries; (2) that beneficiaries were entitled to be treated as though they were the registered shareholders in respect of trust shares, with the advantages and disadvantages (for example, restrictions imposed by the articles) which that position involved and that they could compel the trustee directors, if necessary, to use their votes as the beneficiaries or the court, if the beneficiaries themselves were not in agreement, thought proper even to the extent of altering the articles of association if the trust shares carried votes sufficient for that purpose; (3) that in the present case, if the plaintiff first specified the documents of the company which he wished to see, secondly made out a proper case for seeing them and thirdly was not met by any valid objection by the other beneficiaries or by the directors from the point of view of the company, then the directors should give inspection, not because they could be compelled to do so as directors but in order to avoid an order compelling them to use their voting powers so as to bring about what the plaintiff desired to achieve.

In re Cowin (1886) 33 Ch.D. 179 considered.

Decision of Harman J. reversed.

APPEAL from Harman J.

The testator, Robert Henry Coate Butt, on October 13, 1937, formed a private company called the Weston-super-Mare Residential Flats Ltd., to take over and develop certain properties consisting of blocks of flats which he owned. The capital of the company was £115,000, divided into 80,000 £1 preference shares and 35,000 £1 ordinary shares. Of these all the preference and 22,852 ordinary shares were issued. The voting power was confined, in the events which had happened, to the ordinary shares. The company's articles of association provided by art. 121 that the directors should cause proper accounts to be kept and that the books of account should be kept at the company's office or at such other place as the directors might think fit and should be always open to the inspection of the directors. Article 22 provided: "The directors shall from time to time determine

“ whether, in any particular case or class of cases, or generally,
 “ and to what extent, and at what times and places and under
 “ what conditions or regulations the accounts and books of the
 “ company, or any of them, shall be open to the inspection of
 “ members, and no member (not being a director) shall have any
 “ right of inspecting any account or book or document of the
 “ company, except as conferred by statute or authorized by the
 “ directors or by a resolution of the company in general meeting.”

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The testator held all the issued ordinary shares of the company except two shares, one of which was held by the first defendant Blanche Mary Kelson and the other by the third defendant Ralph Sankey Jutsum. The testator was the chairman and managing director of the company. The first and third defendants were also directors of the company. The testator by his will dated June 13, 1944, appointed the first defendant Blanche Mary Kelson, the second defendant Wallace Howard Kelson and the third defendant Ralph Sankey Jutsum to be his executors and trustees. He bequeathed three legacies of £250 each, including one to the second defendant, a grandson, and he directed his executors to transfer ordinary shares in the company to the legatees in satisfaction of their legacies. He directed his trustees to retain a further 1,000 ordinary shares in the company on certain trusts. He then gave his residuary estate to the defendants upon the usual trusts for sale, conversion and investment. He directed the defendants to hold his residuary estate on somewhat complicated trusts. He directed them to pay to his son Robert Arthur Butt, the plaintiff, an annuity of £250 a year from the testator's death for a period of 14 years. He also gave to the plaintiff three-tenths of certain income described by the testator as “ the said residue of income of my residuary estate.” At the expiration of 14 years from the death of the testator, the plaintiff was to receive £1,000 and a further £500 at the expiration of 20 years. After the death of the first defendant, the plaintiff was to receive during his life three-tenths of the income of the ultimate residue of the testator's estate. The will contained an express power authorizing the defendants to continue to hold the testator's shares in the company and to act as directors.

The testator died on November 7, 1944, and his will was proved by the three defendants. On September 3, 1946, the necessary qualification shares having been transferred to him, the second defendant was appointed a director of the company. Thereafter the three defendants were the sole directors of the

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company. When the writ was issued they held as trustees of the will 22,100 of the 22,852 ordinary shares which had been issued.

The plaintiff became dissatisfied with the defendants' management of the company's affairs. He wished to investigate the manner in which they conducted the company's business, and for that purpose he wanted to see all the books and documents relating to the company's affairs in their possession as such directors. The defendants contended that the plaintiff was only entitled to receive from the defendants, the testator's trustees, such information relating to the company's affairs as would be available to him if he were a shareholder of the company but not a director. The plaintiff contended that since substantially the whole of the share capital of the company formed part of the estate of the testator, and since the defendants were directors of the company solely by virtue of their voting power in respect of the shares comprised in the testator's estate, each of their acts as directors of the company were done in the execution of their duties as trustees and all papers, books, documents and records which since their appointment had come into their hands had come to them as executors or trustees of the testator's will, and accordingly the plaintiff as a beneficiary under the will was entitled to see all such papers, books, documents and records and to take copies of them at his own cost, and in this action he claimed a declaration to that effect.

Harman J. in his judgment dealt with the plaintiff's claim in this way: After referring to the defendants' attitude in the matter, namely, "You can see everything which came into our custody, power or control by virtue of our sharing in the company because we are shareholders qua trustees," but refusing to allow him to see anything which came into their hands as directors, he said: "That in my view is entirely wrong. They are directors because they are trustees and for no other reason. It is true that two of these people were directors of the company before the death of the testator, but they have retired by rotation and have re-elected themselves by virtue of their shareholding in the trust estate and by virtue of no other right, title or interest. Why if that which comes to them as shareholders by virtue of the trust shareholding is disclosable, that which comes to them as directors by virtue of the trust shareholding is not, I entirely fail to appreciate; but it may well be that the defendants have made too much of a concession and

“that they ought to have made none, and I am asked to consider what is the right of a beneficiary in those circumstances. In this case I am not going to lay down any wide proposition of law; but in my judgment where there is no outside interest in the company, which is merely the creature of the testator or the settlor or indeed the creation of the trustees under the powers conferred upon them by the will or settlement, the beneficiaries are no less entitled to see documents of that kind or to inquire into the company’s accounts and affairs than they would be if the property in question were being managed by the trustees without the intervention of a company with limited liability. We are often reminded that a corporation is a personality independent of the corporators. That doctrine, however, can be carried far beyond its logical conclusion if it is going to be argued that where you get a company of this sort in which nobody outside the estate has any interest, the trustees can put themselves into a position of security and secrecy merely by interposing a limited company between the beneficiaries and themselves.”

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Harman J. made an order in the following terms: “This court doth declare that so long as the plaintiff is beneficially interested in the property subject to the trusts of the will of the testator Robert Henry Coate Butt, and so long as the defendants or any of them are directors of the company in the pleadings mentioned by virtue of their being registered holders of the shares in the company which are comprised in the testator’s estate, the plaintiff is entitled to inspect and take copies at his own expense of all papers, books, documents and records which shall come into or which have come into the custody, power or control of the defendants or any of them as such directors or director.” The order gave liberty to apply for production of the above-mentioned documents.”

The defendants appealed.

Sir Lynn Ungood-Thomas K.C. and *T. A. C. Burgess* for the defendants. It is contended that the beneficiaries are not entitled to copies of all papers coming into the possession of the trustees as directors of the company. It is a question how far the trustees’ right of inspection can be carried through to shareholders. The defendants object to anything they learn as directors being passed on to the beneficiaries. Harman J. made, it is submitted, two errors: (1) in failing sufficiently to distinguish between the defendants’ position as trustees and their position as directors;

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and (2) in ignoring the fact that not all the shares of the company were comprised in the testator's residuary estate and the legatees have rights as shareholders.

Even if the court in administering the estate could require the trustees to divulge information which they had acquired as directors, the court would not give the same right to the beneficiaries. To reveal what the trustees learn as directors of the company would be inconsistent with their duty to the company. Supposing the trustees by their votes appointed independent directors, would such directors have to make revelations to the shareholders?

[EVERSHED M.R. If the plaintiff wanted to see every document it might make the carrying on of the company's business impossible.]

That is just what is claimed and what is objected to. The trustees might well accept a much more qualified order. The plaintiff is seeking to establish the proposition that beneficiaries are entitled to require directors of a company who are trustees to disclose all the documents in their possession as directors. If the plaintiff is right, he would have a roving commission to investigate the affairs of the company. The defendants object to the order which Harman J. made. It is contended that it is too wide. While they have no objection to showing the plaintiff any specific documents which he proves that he is concerned to see, they object to him seeing the directors' minute book, since it contains confidential information as to the company's tenants.

It is important in this case to keep in mind the fact that a company is a separate entity from its shareholders: *Gramophone and Typewriter Ltd. v. Stanley*.¹ If the constitution of the company does not entitle the shareholders to insist on the disclosure of documents under the control of its directors, the beneficiaries, who are not shareholders, cannot have more extensive rights. The defendants' contention is that beneficiaries have no greater rights against trustee directors than they would have if they were themselves shareholders of the company. The defendants are prepared to give to the plaintiff all the information to which he would be entitled if he were in fact a shareholder.

The order made by the judge takes no account of the position of minority shareholders, who may object to the beneficiaries having rights which such shareholders do not possess. Nor is it clear what would be the result of the order if some of the shares

¹ [1908] 2 K.B. 89.

were transferred to third persons. Would the right of disclosure the order confers pass to transferees of the shares or would it remain vested in the beneficiaries? The result of the order is some persons can insist on disclosure while others cannot. [They referred to *In re Cowin, Cowin v. Gravett*.²]

The difficulty which has arisen in this case is attributable to the fact that the plaintiff seeks to treat the directors as trustees of their powers as directors. The directors' powers are not the subject of any trust. It is the shares which are the subject of the trust.

Cross K.C. and *G. H. Newsom* for the plaintiff. It is agreed that the order which Harman J. made is too wide. The plaintiff accepts the fact that his right to see documents in the possession of the defendants is only a *prima facie* right. Trustee directors may have good reason for refusing to allow inspection of documents in their hands; for example, if a beneficiary were carrying on a competing business. If all the shares of a company were settled, then the beneficiaries would have a right to inspect all documents in the hands of the directors. There is no rule of company law by which shareholders cannot see the documents in the hands of the directors. The shareholders' rights depend on the constitution of the company. It is submitted that the rule is that any document coming to trustees as such is open to inspection by the beneficiaries. Persons holding a majority of shares can by resolution require documents to be produced by passing the necessary resolution. The trust shareholding in this case carries the power to see documents held by the directors. The beneficiaries have an equitable right to enforce disclosure. *Prima facie* in a case of this character the directors should disclose all the documents in their possession. The position would be different if there were a substantial minority shareholding. The plaintiff's case here is based on the fact that substantially all the shares are held by the defendants.

It is submitted that so long as the trustees as trustees hold more than 50 per cent. of the shares of the company, they have power by resolution to make the directors disclose all documents to the shareholders, and accordingly a beneficiary has the *prima facie* right to have the documents made available for his inspection. If the trust does not comprise a majority holding, the beneficiary could not insist on inspection. The position of a beneficiary where the business is carried on by trustee directors

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² (1886) 33 Ch.D. 179.

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1951 a beneficiary whose trustees are carrying on a business on behalf
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It is submitted that where the settled shares give control of the company, the beneficiaries have a right to go behind the shares to see documents in the hands of the directors. They could enforce this right by requiring the trustees as shareholders to pass the necessary resolutions.

Sir Lynn Ungood-Thomas K.C. in reply. It is important to preserve the company machinery. If that machinery is improperly exercised, the directors would be exposed to a claim of oppression by the minority shareholders. In this case, the articles give the directors a discretion whether documents shall be disclosed to shareholders or not. The correct order to make in this case is that the plaintiff must apply for the disclosure of any particular document which he desires to see and prove that it is reasonable for him to do so.

ROMER L.J., after stating the facts:—The defendants have appealed against the order of Harman J., and the gist of their complaint against his judgment is first, that it does not, as they say, distinguish between the position of the defendants merely as trustees on the one hand and the position of the defendants as directors of the company on the other hand; secondly, it ignores the right of the shareholders in the company, other than the trustees themselves, namely, the legatees to whom shares have been transferred. *Sir Lynn Ungood-Thomas* crystallized his argument in this way: He said that it is vital to bear in mind the distinction between a business which is being carried on on the one hand by trustees of an estate and a business which is being carried on by a limited liability company in which the trustees merely hold shares: the rights of the beneficiaries in the former case *prima facie* would be to see such documents and papers relating to the business as the trustees might have in their hands, on the ground that in effect the beneficiaries are the owners of the business. That is a principle which has been well established and was recognized, for example, in *In re Cowin, Cowin v. Gravett*.³ But he says where you get a case of the second type, namely, where the business is carried on by a limited company and the beneficiaries are interested not in the business itself but as *cestui que trusts* of shares held by the trustees, then

³ 33 Ch.D. 179.

the only rights that the beneficiaries have are rights to see that the trustees use their voting power attaching to the trust holding in the best interests of the beneficiaries themselves; and the only control over the trustee directors which the beneficiaries can ask the court to enforce is a control operated through the medium of the shares. The right of a beneficiary, or of the beneficiaries if they are united, is to compel the trustees to use their voting power in the best interests of the trust estate even to the extent, if need be and if the voting power is sufficiently large, of altering the articles of association. But what he says the beneficiaries have no right to do is to regard the directors' powers as forming part of the trust estate. He says that is precisely what the plaintiff in the present case is trying to do and what the judge below has held that he is entitled to do.

After the form of declaration had been discussed from various angles, Mr. Cross, for the plaintiff, very rightly admitted that it went beyond what he could really ask this court to uphold, because, when the declaration is analysed, one finds that it is difficult to sustain. The judge disclaimed any intention of laying down any general proposition of law and was obviously intending to confine his order (at least so I think) to a case where the whole of the shares of a private company are held by trustees for the benefit either of only one beneficiary or of two or more beneficiaries, all of whom are exactly of the same mind as to what they want to have done. It appeared to him that it would be very wrong in such a case as that, that the directors should set the beneficiaries at defiance and say: "Although you are virtually 'the owners of the company in equity, nevertheless we are not 'going to tell you what is going on, because we are directors.'" It seemed to the judge that it was a very wrong conclusion at which to arrive, that beneficiaries in that position should not have the right which they were claiming, more especially, as I think, because he in some respects took a somewhat poor view of certain of the defendants' activities. But when one starts, as I say, to analyse this declaration and to see how far it goes, one finds that one is confronted with a series of difficulties. A declaration in this form would result in one beneficiary, who was not on the register at all, getting information which not only would not be available to him even though he were a registered shareholder, but might be very greatly prejudicial to the company and the interests of his fellow beneficiaries who might not wish him to have access to the documents. For example, one could readily

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imagine a case where a company was carrying on the exploitation of some secret process and if the principle underlying this declaration were to be right then a beneficiary, who either was already, or was contemplating carrying on a rival business, could call upon the trustee directors to furnish him with information which might be very detrimental to the company. Then it is to be observed that the declaration provides that: "So long as the defendants or any of them are directors of the company . . . by virtue of their being registered holders of the shares." That is apparently a reference to the fact that in this case the directors have got more than 50 per cent. of the holding and can vote themselves into or out of office as they like. So that would have to be altered in some sense, so that it was limited to such times as the trust shareholding represented more than 50 per cent. of the total issued capital. But then that would not be enough, because it may be that if the plaintiff was to be entitled to the inspection he desired, then the articles would have to be altered and the directors could not do that unless they held 75 per cent. to pass a special resolution. So, in order to meet that case, the declaration would have to be varied so as to operate only so long as the director trustees held 75 per cent. of the issued capital by virtue of the shares comprised in the testator's estate.

Again, the declaration makes no provision for the fact that other shareholders in the company might take a grave objection to the plaintiff being allowed to see documents which they themselves are not allowed to see—especially as he is not even a shareholder of the company—and more especially that he should be allowed to take copies without being put on any undertaking, or any safeguard being provided, as to the use to which he would put them. Taking those and other considerations into account, Mr. Cross was fain to admit that the declaration went further than he could legitimately ask this court to support, although it is to be observed that it goes no further than the declaration which in the statement of claim the plaintiff asked the court to make. I am not quite sure to what extent the judge intended the principle that a beneficiary can call upon a trustee director to furnish him with information and inspection to apply, whether it was intended to be limited to cases where there are no outside interests, in the sense that there are no interests apart from the trust interest, or whether it was intended to include cases (and indeed this is such a case) where although there are no outside interests in that sense nevertheless there are or may be conflicting

interests as between the beneficiaries themselves. For myself, I think that if one accepts the principle at all, it is difficult to confine it within any properly definable limit and, in my judgment, it is a principle which it is dangerous to accept and which ought not to be accepted at all. It might, as I have indicated, result in very unfortunate consequences.

What I think is the true way of looking at the matter is that which was presented to this court by Sir Lynn Ungood-Thomas, that is that the beneficiaries are entitled to be treated as though they were the registered shareholders in respect of trust shares, with the advantages and disadvantages (for example, restrictions imposed by the articles) which are involved in that position, and that they can compel the trustee directors if necessary to use their votes as the beneficiaries, or as the court, if the beneficiaries themselves are not in agreement, think proper, even to the extent of altering the articles of association if the trust shares carry votes sufficient for that purpose.

In the present case, the trust holding gives complete control over the management of the company, and the sort of way in which I approach the plaintiff's right in this matter is this, that if he, firstly, specifies the documents of the company which he wishes to see; secondly, makes out a proper case for seeing them, and, thirdly, is not met by any valid objection by the other beneficiaries or by the directors from the point of view of the company, then the directors should give inspection, not because they can be compelled to do so as directors, but as a short circuit, if one may so describe it, to an order compelling them to use their voting powers so as to bring about what the plaintiff desires to achieve. If that be the right way of approaching this matter, then I do not think any further difficulties arise in this case. So long as the plaintiff gets out of his head the idea that he is entitled to call upon these directors to use their powers as directors as though they held those powers on trust for the plaintiff, and if he realizes that his rights in relation to the trust holding are as I have briefly described them, then I do not think that any difficulty should arise. If difficulty does arise because some of the beneficiaries object to the plaintiff seeing the document he wants to see, or because the directors think that it is not right that the plaintiff should see them, then he can make an application to the court in these proceedings for the purpose of having the matter determined by the court. I would propose, accordingly, that the declaration which has been made be discharged, but that there should be inserted into the order liberty

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C. A. to the plaintiff to apply in these proceedings in relation to any
 1951 document which he may hereafter desire to see and of which the
 defendants decline to give him inspection. That is the kind of
 order in general that I suggest.

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BIRKETT L.J. I agree and have nothing to add.

EVERSHED M.R. I also agree. The form of the order will be: appeal allowed and the order varied by striking out the declaration and inserting liberty to apply to the judge as regards any documents of which from time to time the plaintiff may desire to have inspection. It is understood that the plaintiff's right to inspect documents is subject to his giving proper assurances that he will not disclose them to anybody but his legal advisers and no copies must be made except such as he may be properly advised.

Appeal allowed.

Solicitors: *Waterhouse & Co., for John Hodge & Co., Weston-super-Mare; Darley, Cumberland & Co.*

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UPJOHN J. *In re MELDRUM, DECD. SWINSON v. MELDRUM.*

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[1950 M. 4382.]

Will—Administration—Order of application of assets in payment of debts—Gift of residue of deposit account after liquidation of all debts—Whether gift or residuary estate primarily liable—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 34 (3); Sch. I, Pt. II, paras. 2, 4, 8 (a).

A testator, who died on June 1, 1948, by clause 4 (q) of his will made on May 21 previous gave to his adopted daughter, the second defendant "the sum of £500 for her immediate expenses . . . and "the residue of my deposit account at L. bank, D., after all "legacies debts funeral and other expenses have been liquidated but "excluding death duties and testamentary expenses." By clause 9 he disposed of "all other residue of my property" on trusts in favour of the second defendant and the first defendant, his son.

On the hearing of a summons taken out to ascertain whether, in view of the provisions of section 34 (3) and Sch. I, Pt. II, of

the Administration of Estates Act, 1925, the testator's debts were primarily chargeable on the deposit account or on the testator's residuary estate:—

Held, that the effect of the relevant provisions of the Act was, that it was a matter of construction of the will in question whether the order laid down by the schedule applied, or whether it was varied by the terms of the will; and that in the present case the terms of the will indicated that it was the testator's intention to charge the debts primarily on the deposit account, so that the provisions of the schedule were varied accordingly.

In re James [1947] Ch. 256; *In re Kempthorne* [1930] 1 Ch. 268, and *In re Littlewood* [1931] 1 Ch. 443 considered.

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The testator, Harrison Meldrum, who died on June 1, 1948, made his will on May 21, 1948. By clause 4 of his will he gave a number of legacies free of duty, including the following gift to the second defendant, his adopted daughter: “(q) To Annie Leeman Meldrum the sum of £500 for her immediate expenses and all articles of domestic or personal use and ornament . . . and all moneys standing to the credit of my current account with Lloyds Bank at Dartmouth and of my deposit account with the Post Office Savings Bank and also all my War and National Savings Certificates and the residue of my deposit account at Lloyds Bank Dartmouth after all legacies debts funeral and other expenses have been liquidated but excluding death duties and testamentary expenses.”

Clause 9 provided: “I devise and bequeath all the residue of my property . . . unto my trustees upon trust to pay the income as to three fourths to Harold Meldrum,” the testator's son, who was the first defendant, “and as to one fourth to the said Annie Leeman Meldrum during the life of the said Annie Leeman Meldrum and after the death of the said Annie Leeman Meldrum to hold my residuary estate upon trust for the said Harold Meldrum absolutely.”

A summons was taken out for the determination of the questions, (1) whether, on the true construction of clause 4 (q), “debts” included sums of £9,000 and £10,000 owed by the testator to certain companies (which does not call for a report), and (2) whether, having regard to the provisions of the Administration of Estates Act, 1925,¹ the testator's debts were primarily

¹ Administration of Estates Act, 1925, s. 34 (3): “Where the estate of a deceased person is solvent his real and personal estate shall, subject to

“rules of court . . . and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary

UPJOHN J. chargeable on the deposit account at Lloyds Bank, or on the residuary estate.

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R. J. T. Gibson for the plaintiff trustees.

Christie K.C. and *J. G. Monroe* for the first defendant. It is submitted that the language of clause 4 (*q*) is quite plain, and that the testator clearly intended to charge the debts and other specified liabilities on the deposit account: it is only the "residue" of this account, after meeting the liabilities, which is given to the second defendant.

That being so, the will must be construed to have altered the order of application of the assets, in accordance with para. 8 (*a*) of the schedule, and residue is exonerated to the extent that the deposit account is capable of meeting the debts. It is submitted that *In re James*² covers the facts in this case.

[*In re Smith*³ and *In re Beaumont's Will Trusts*⁴ were also referred to.]

Montgomery White K.C. and *J. A. Brightman* for the second defendant. It is submitted that the order provided by the schedule should take effect, and that the deposit account is charged in aid of, not in exoneration of, residue.

In the schedule no distinction is any longer drawn between realty and personalty; the intention was to assimilate personal property to the rule affecting real property before 1926, so that there must be found in the will a positive intention to exonerate the fund primarily liable, i.e., residue. It is not sufficient to override the schedule merely to charge some other property: see *In re Kempthorne*,⁵ which was followed in *In re Gordon, decd.*⁶

If it is said that those cases are difficult to distinguish from

"and administration expenses, debts
"and liabilities payable thereout in
"the order mentioned in Part II of
"the First Schedule to this Act."

Schedule I, Part II: "Order of
"application of assets where the
"estate is solvent. (1) Property of
"the deceased undisposed of by will,
"subject to the retention thereout of
"a fund sufficient to meet any
"pecuniary legacies. (2) Property of
"the deceased not specifically devised
"or bequeathed but included (either
"by a specific or general description)
"in a residuary gift, subject to the
"retention out of such property of a
"fund sufficient to meet any pecu-

"niary legacies, so far as not
"provided for as aforesaid. . . .

"(4) Property of the deceased charged
"with, or devised or bequeathed
"(either by a specific or general des-
"cription) subject to a charge for the
"payment of debts. . . . (8) The
"following provisions shall also apply
"—(*a*) The order of application may
"be varied by the will of the
"deceased."

² [1947] Ch. 256.

³ [1913] 2 Ch. 216.

⁴ [1950] Ch. 462.

⁵ [1930] 1 Ch. 268.

⁶ [1940] Ch. 769.

*In re Littlewood*⁷ and *In re James*,¹⁰ it is submitted that the latter cases were incorrectly decided and ought not to be followed.

Further, the testator has given in clause 4 (g) a pecuniary legacy of £500 to the second defendant, and it is absurd to suppose that his intention was that this sum was to come out of the specific gift which he was making to her.

The order made in *Higgins v. Dawson*⁸ shows that the general rule may apply in cases where the "residue" only of a specified asset is given.

J. G. Monroe in reply. It is submitted that the intention of the schedule was to bring realty into line with the former rule affecting personalty; that is, if the will charges an asset with the payment of debts, the residue is exonerated: see the observations of Lawrence L.J. in *In re Kempthorne*,⁹ and Theobald on Wills, 10th ed., at p. 583.

On the authority of *In re James*¹⁰ and *In re Littlewood*,¹¹ it is sufficient to exonerate residue, if there is another gift which is charged with payment of debts, and a plain gift of residue.

Here, the gift is of "the residue of" a particular fund, not of the fund itself. That plainly shows an intention contrary to the statutory order: it is impossible to determine what constitutes the residue of a particular fund until the debts charged upon it have been paid.

[UPJOHN J. How can that submission be reconciled with the order in *Higgins v. Dawson*¹²?

It would appear that the order went through in some way sub silentio; there are certain indications that it was an agreed order.

UPJOHN J. [after stating the facts, and deciding that the expression "debts" in clause 4 (g) included the sums of £9,000 and £10,000 in question, continued]:—Now I turn to the difficult and important question as to the effect, if any, of the Administration of Estates Act, 1925, on the charge imposed by the will. [His Lordship read section 34 (3) and paras. 1, 2, 4 and 8 (a) of Sch. I, Pt. II.] Mr. Montgomery White, for the second defendant, urged upon me that as there was a residuary gift here, therefore, having regard to para. 2 of the schedule, that was the primary fund for payment of the debts and funeral and

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⁷ [1931] 1 Ch. 443.

⁸ [1902] A.C. 1, 13.

⁹ [1930] Ch. 268, 298.

¹⁰ [1947] Ch. 256.

¹¹ [1931] 1 Ch. 443.

¹² [1902] A.C. 1, 13.

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testamentary expenses. He admits that clause 4 (q) imposes a charge on the deposit account for the payment of debts, but he says, having regard to the terms of the schedule, that that charge ranks behind the provisions of para. 2, so that residue remains the primary fund.

It is plain from the statutory provisions, both in the body of section 34 and in para. 8 of the schedule, that the provisions in Pt. II of the schedule are subject to the provisions contained in the will, and that the order of application may be varied by the will; in other words, it is really essentially a matter of construction of the will in each case whether the provisions of the schedule apply, or whether they have been varied by the terms of the will; and I propose, therefore, to consider in the first place the construction of this will before turning to the authorities which have been cited to me.

When I read that there is a pecuniary legacy to the second defendant of £500 followed by specific gifts of certain domestic and personal articles, followed in turn by specific gifts of moneys standing to the credit of the current account with Lloyds Bank and the deposit account at the Post Office Savings Bank and National Savings Certificates; and the testator continues "and the residue of my deposit account at Lloyds Bank "Dartmouth after all legacies debts funeral and other expenses "have been liquidated but excluding death duties and testamentary expenses," I can feel no doubt in my own mind what the testator was meaning to do; and I should have thought it was clear almost beyond argument that he was intending to direct that the legacies he had given and his debts and funeral and other expenses, whatever they might be, were to be discharged out of the deposit account, and that his death duties and testamentary expenses were to be discharged out of residue, which was the other fund for discharge of those obligations.

With respect, I agree with the words of Roxburgh J. in *In re James*¹³: "I should hold that the direction to pay debts out of "a particular fund necessarily involved an intention to exonerate "some other fund which the testator disposed of in some other "part of his will—in other words, necessarily involved an intention to exonerate the residue of his estate which he devised and "bequeathed to his wife absolutely."

It is true that in that case the direction was a direction to trustees to realize certain property and to pay certain obligations,

¹³ [1947] Ch. 256, 258.

but in this case, speaking for myself purely without reference to authority and solely regarding the words of this will, I should have thought that the testator was plainly saying: "You pay the legacies debts and funeral and other expenses out of the deposit account; you pay the estate duty and testamentary expenses out of residue"; in other words, to paraphrase the words which the testator has used, in my judgment it is as though he said in clause 9: "I devise and bequeath all the residue of my property, etc., to my trustees upon trust after discharging death duties and testamentary expenses to pay the income in the way indicated." Had he done that, I hardly think there could have been any argument about it.

It was submitted, and I think forcibly, that when you look at clause 4 (g), you find that the second defendant is given a general legacy of £500 for her immediate expenses, and it was contended that the testator must have intended that that sum should in any event be paid out of residue, because it would be absurd to suppose that the testator was really intending that it was to come out of the specific gift of the residue of the deposit account which she was given in that very same clause.

I am not unimpressed by that argument, but I think that the testator had it in mind that the second defendant, with whom he was in the relation of a father and a daughter, would want £500 for her immediate expenses. No doubt he contemplated that that sum was going to be paid out immediately after his death, and I do not think he was considering at that time where the £500 was ultimately to come from. At all events, although it gives rise to a difficulty, I cannot accept it as overriding what seems to me to be the very clear words at the conclusion of that clause.

That being my view of the true construction of this will, I turn to the authorities to see whether there is anything in them which prevents me from giving effect to what I think are the intentions of the testator, which quite clearly, in my judgment, vary the order of application of assets laid down in Pt. II of Sch. I to the Administration of Estates Act, 1925.

I have naturally and properly been pressed by Mr. Montgomery White with the decision in *In re Kempthorne*,¹⁴ which was overruled by the Court of Appeal, but only on a point of construction of that particular will. I was pressed with the following words of Maugham J.¹⁵: "Then come two further paragraphs, which

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¹⁴ [1930] 1 Ch. 268.¹⁵ *Ibid.* 278.

UPJOHN J. "I think are somewhat difficult to understand, in relation to
 1951 "the subject-matter." He is referring to the paragraphs in the
 MELDRUM, schedule to the Administration of Estates Act, 1925. Then:
 DECD., "The third item of property is 'Property of the deceased speci-
 In re. fically appropriated or devised or bequeathed (either by a
 SWINSON 'specific or general description) for the payment of debts.'
 v. "The fourth is 'Property of the deceased charged with, or devised
 MELDRUM. "or bequeathed (either by a specific or general description)
 "subject to a charge for the payment of debts.' Now in both
 "of those cases it is to be noticed that the legislature is assuming
 "that the testator by his will has specifically appropriated in one
 "case, or devised or bequeathed in the other, property for the
 "payment of debts; or that he has charged with payment of debts
 "specific property, or some property, under a general description,
 "or devised or bequeathed property subject to a charge for pay-
 "ment of debts, and I cannot help concluding that those two
 "paragraphs mean that the fact that the testator has done one
 "of those things is not per se to constitute, to use the words of
 "section 34 (3), a provision in the will which operates to alter
 "the order of application which is specified in Pt. II of the
 "schedule." That statement of the law was acted on by Ben-
 nett J. in the case of *In re Gordon, decd.*,¹⁶ which he treated as
 binding on him notwithstanding that the decision of Maugham J.
 was reversed on the particular facts of that case.

As I understand Maugham J., he is saying: "Having regard
 "to the fact that para. 1 or para. 2 are present in the schedule,
 "it is not sufficient to find an indication in the will that a
 "particular piece of property is to be charged with payment of
 "debts to assume that the testator is intending to alter the order
 "of application of assets"; because if that were so, you never
 could give effect in such a case to a case where there was a
 partial intestacy bringing in para. 1, or residue (as in this case)
 bringing in para. 2. I think that Roxburgh J. in *In re James*¹⁷
 recognized that fact in the clearest terms; but, nevertheless, it
 seems to me to remain a question purely of construction of each
 will whether or not the testator has varied the order of application
 of assets or not.

I was pressed by Mr. Montgomery White to hold that the
 intention behind the schedule was to assimilate the rule in rela-
 tion to personal property to the rule regarding real property before
 1926. That rule was quite clear and is to be found stated in *In re*

¹⁶ [1940] Ch. 769.

¹⁷ [1947] Ch. 256.

Smith,¹⁸ namely, that where there was a charge of debts on real estate, then to exonerate personalty from payment of those debts there must be found a clear indication in the will, not merely to charge debts on the property, but an intention to exonerate the other property which would otherwise be liable for the debts; whereas with regard to personal estate it was sufficient to find a charge to pay debts on personal estate to exonerate residue.

Mr. Monroe pressed me to adopt the contrary view; that is to say, that the legislature in the Administration of Estates Act, 1925, was intending to bring realty into line with the previously existing rule relating to personalty, and he referred me to an observation of Lawrence L.J. in *In re Kempthorne*.¹⁹

My own view of the matter remains that it is a question of construction of each will whether or not the testator has intended to vary the order of application of assets. The Act clearly so provides and that view is also justified by two authorities. The first is *In re Littlewood*,²⁰ a case not entirely dissimilar to the present, for there was an express charge of debts and funeral and testamentary expenses on a specific bequest followed by an absolute gift of residue. The will was executed before the coming into force of the Administration of Estates Act, 1925, and Maugham J. construed it in the light of the pre-existing law; and in the light of that law he came to the conclusion that, on the true construction of the will, the charge of debts on certain specific bequests did in fact exonerate the residuary estate, and, therefore, he came to the conclusion that the testator had intended to alter the order of application of assets.

He said²¹: "In *In re Kempthorne*¹⁹ I endeavoured to explain "the difficulty which I felt in giving effect to some of the provisions of that part of that schedule, and I understand that the "Court of Appeal, who differed from me on one point in that "case, also felt some difficulty in explaining the precise effect "of those provisions. I think, however, that I am justified "in taking the view that, *prima facie*, the paragraphs of the "schedule are to have effect, subject to the provisions of the "will of the deceased, in cases where there is a reasonably clear "indication of the intention of the deceased; and a *fortiori*, I "think, is that the case where the will was executed before the "coming into force of the Administration of Estates Act, 1925.

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¹⁸ [1913] 2 Ch. 216.²⁰ [1931] 1 Ch. 443.¹⁹ [1930] 1 Ch. 268, 298.²¹ *Ibid.* 446.

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“ In the present case I have come to the conclusion that the
“ testatrix has definitely expressed a desire that the debts and
“ funeral and testamentary expenses and legacies shall be paid
“ out of or charged upon the farm stock, implements and tenant
“ right of which she has disposed; and, following the principle
“ adopted by the Court of Appeal in *In re Kempthorne*¹⁹ and by
“ Clauson J. in *In re Atkinson*,²² I hold that the order of applica-
“ tion of assets specified in Pt. II of Sch. I to the Administration
“ of Estates Act, 1925, has been varied by the provisions in the
“ will of the testatrix.”

The second authority is the decision in *In re James*,²³ to which I have already referred. In that case Roxburgh J. construed the will, and found as a matter of construction that the testator had indicated an intention to vary the order of application of assets, and in his view he was entitled, therefore, as a matter of construction of the will, so to decide.

I am not unimpressed by the argument of Mr. Montgomery White that it is difficult to reconcile those cases with the statement of the law of Maugham J. in *In re Kempthorne*,²⁴ to which I have referred, but having come to the conclusion, as I have, that it is a matter of construction of each will, I find nothing in the authorities which precludes me from giving effect to what I feel are the clear indications in clause 4 (q) as to what the testator intended.

Accordingly, for those reasons, I propose to declare that the two sums of £10,000 and £9,000 are debts within the meaning of clause 4 (q) of the will, and that on the true construction of the will they ought to be paid primarily out of the testator's deposit account at Lloyds Bank Ltd.

In the circumstances, having come to that conclusion, I need not consider the interesting argument which has been addressed to me with regard to the Administration of Estates Act, 1925, and the second part of Sch. I in relation to legacies, because these two debts will in fact more than swallow up the whole of the deposit account.

Declaration accordingly.

Solicitors: *Lattey & Dawe; Kinch & Richardson.*

F. R. D.

²² [1930] 1 Ch. 47.

²⁴ [1930] 1 Ch. 268.

²³ [1947] Ch. 256.

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MANAGEMENT COMMITTEE AND OTHERS.

HARMAN J.

1951
Nov. 21;
Dec. 19.

[1951 E. No. 278.]

Will—Condition precedent attaching to bequest of personalty—Condition void—Malum prohibitum not malum in se—Bequest valid.

A bequest of personalty subject to an illegal condition precedent is void if the condition be malum in se, but if the condition be only malum prohibitum, the bequest will be effective and unfettered by the condition.

This principle has been imported into equity from the civil law. See the authority of Lord Hardwicke L.C. in *Reynish v. Martin* (1746) 3 Atk. 330, 332, quoted and accepted by Bowen L.J. in *In re Moore* (1888) 39 Ch.D. 116, 131.

A testator after directing his trustees to convert his whole estate into money, gave a legacy of £100 to the Burton-on-Trent Infirmary "to be invested . . . for the purpose of maintaining and renovating " my grave and headstone," and subject to the infirmary accepting that legacy and the condition attached to it, he bequeathed the residue of his estate to be applied for the purposes of the infirmary.

When the National Health Service Act, 1946, came into force on July 5, 1948, the infirmary came under the jurisdiction of the first defendant, the Burton-on-Trent Hospital Management Committee, which carried on the work of the infirmary.

Held, that although the condition attached to the legacy of £100 was void as infringing the rule against perpetuities, it was a condition only malum prohibitum which could be disregarded, and the gift of residue therefore passed to the first defendant unfettered by the condition.

In re Thomas's Will Trusts [1930] 2 Ch. 67 distinguished; *Reynish v. Martin* (1746) 3 Atk. 330 and *In re Moore* (1888) 39 Ch.D. 116 followed.

ADJOURNED SUMMONS.

Arthur Elliott made his will on May 26, 1948, and appointed the plaintiff bank his executor and trustee. He directed the bank to convert the whole of his estate both real and personal into money, and after payment of his debts, funeral and testamentary expenses, including any expenses incurred in removing the stone of his grave, relettering, renovating and replacing the same, he bequeathed " the sum of £100 to the Burton-on-Trent " Infirmary to be invested as the bank shall direct for the purpose " of maintaining and renovating my grave and headstone, and " subject to the Burton-on-Trent Infirmary accepting the above " one hundred pounds and the terms as above attaching thereto

HARMAN J. “then I give to the said Burton-on-Trent Infirmary the rest
 1951 “residue and remainder of my estate to be applied for the general
 “purposes of the said infirmary.” He died in August, 1950.

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At the date of the will there was an unincorporated charitable association in Burton-on-Trent known as the Burton-on-Trent Infirmary managed by a board of management. Its assets were vested in a trust corporation.

On July 5, 1948, the National Health Service Act, 1946, came into force. The infirmary, together with other local institutions, came under the jurisdiction of the first defendant, the Burton-on-Trent Hospital Management Committee, under a scheme submitted by the Birmingham Regional Hospital Board and approved by the Minister. The work of the infirmary had since been carried on by the first defendant, and the infirmary continued to be known by its old name, and to carry on its former work.

The bank took out a summons for the construction of questions arising under the testator's will. The question relevant to this report was as to the validity of the gift of residue having regard to the condition attached to it.

M. J. Albery for the plaintiff.

F. E. Skone James for the first defendant, Burton-on-Trent Hospital Management Committee. The condition attached to this legacy is void as it would infringe the rule against perpetuities. Bennett J. held in *In re Thomas's Will Trusts*¹ that where a gift is subject to a condition precedent which is impossible of performance by operation of law, the condition is void but the gift remains good. Accordingly, the gift to the first defendant is effective unfettered by the condition.

Sir Lynn Ungood-Thomas K.C. and *A. A. Baden Fuller* for the second and third defendants, next-of-kin. This is a condition precedent, and the bequest can only take effect subject to the performance of the condition. It is not an extraneous event but a condition on which the gift is dependent.

The upkeep of a tomb is a perfectly lawful act in itself, but the terms on which it is attached to the residuary gift makes it contrary to the rule against perpetuities. The gift to the first defendant is a charitable gift dependent on a condition precedent, but it is subject to the same rules before vesting as any other gift, and since the condition is unlawful the gift never comes into

¹ [1930] 2 Ch. 67.

existence: see *Chamberlayne v. Brockett*² and *In re Dalziel*.³ HARMAN J. This principle was applied in *In re Mander*,⁴ although that case is distinguishable on its facts. If this were not so it would be possible to disregard the rule against perpetuities entirely.

*In re Thomas's Will Trusts*⁵ is distinguishable from the present case, because the former was concerned with a purely extraneous circumstance which subsequently became unlawful. Here the condition is a term of the residuary gift.

In general a void condition attached to a gift of personalty will be disregarded, but there are two exceptions to this rule where the gift will be void: (1) where a testator wrongly supposed the condition to be possible, and (2) where the condition was not impossible at first but becomes impossible after the date of the will: see Swinburne on Wills, 7th ed., vol. 1, pp. 401, 404. This passage was derived from the civil law and has been imported into English law: see *Lowther v. Cavendish*.⁶ The crucial question is whether the testator considered the condition to be possible: Swinburne, p. 404. [He also referred to Swinburne, pp. 387 *et seq.*]

Even if this were originally within *In re Thomas's Will Trusts*,⁷ the two exceptions cited from Swinburne would take it out of that decision.

Alternatively the residuary gift was given to a recipient who at the time of the will was capable of accepting it and performing the condition; but the National Health Service Act, 1946, has come into force since then, and the condition is not a purpose for which the first defendant is permitted to accept property under section 59 of the Act. There is not now, therefore, anyone who is able to perform the condition, and the gift is dependent on a condition which has subsequently become impossible.

F. E. Skone James in reply. The law as laid down in *In re Thomas's Will Trusts*⁷ was not dependent on whether the testator supposed the condition to be possible; that point was disregarded. The exceptions stated in Swinburne are not part of the law of England and they were not considered in *In re Thomas's Will Trusts*.⁷ If they had been, Bennett J. would have decided that case the other way. Until that authority be overruled it must be considered to apply. [He referred to *In re Turton*.⁸]

Cur. adv. vult.

² (1872) L.R. 8 Ch. 206, 210, 211.

³ [1943] Ch. 277.

⁴ [1950] Ch. 547.

⁵ [1930] 2 Ch. 67.

⁶ (1758) 1 Eden 99, 116.

⁷ [1930] 2 Ch. 67.

⁸ [1926] Ch. 96.

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December 19. HARMAN J., in a written judgment, stated the facts and continued:—In the circumstances, if there had been no condition attached to the gift I should have had no hesitation in holding that it went to the first defendant in accordance with the decision of Roxburgh J. in *In re Morgan's Will Trusts*,⁹ followed by myself in *In re Meyers*,¹⁰ on the footing that the gift was a gift for the work still being carried on under the new régime. This, however, is not an absolute gift but is, in my judgment, a gift subject to a condition precedent under which the infirmary is only to take the residue, if it accepts the legacy of £100 and accepts the terms, which are, to maintain and renovate the testator's grave and headstone. It appears from the evidence that the testator was the owner of a grave in the Burton-on-Trent Corporation cemetery, where his wife and daughter were already buried when the will was made. Having regard to the terms of the gift I have come to the conclusion that it was the testator's intention that the £100 legacy should be set apart in perpetuity for the purpose of maintaining and renovating the grave out of its income and that the legatee was not intended to have the right to spend the corpus of the fund. I come to this conclusion because the initial renovation of the grave is to be done by the bank before setting aside the legacy, and because the legacy is directed to be invested.

It was admitted before me, and I think rightly, that if this were a perpetual gift of a legacy for the purpose of preserving a grave unconnected with the fabric of a church it was void as creating a perpetuity. If then the legacy be void, the £100 falls into residue. Nevertheless, the condition remains, but it is an illegal condition which the residuary legatee cannot lawfully carry into effect. The question is, therefore, whether the illegality of the condition avoids the gift or whether it can be disregarded. If this were a gift of real property it is clear that failure to perform the condition must avoid the gift. This is and always has been the English law, and is illustrated by *Egerton v. Earl Brownlow*.¹¹ Compare the decision of Astbury J. in *In re Turton*,¹² and see also the following statement in Roper and White on Legacies, 4th ed., vol. 1, p. 754: "It is a general rule of the common law, applicable to *real* estates, that where an interest is so devised as only to arise upon a preceding condition, it cannot vest until that condition be performed, or

⁹ [1950] Ch. 637.¹⁰ [1951] Ch. 534.¹¹ (1853) 4 H.L.C. 1.¹² [1926] Ch. 96.

“ the event happen, upon which it is given. This rule has been
 “ acknowledged and acted upon ever since the time of Lord
 “ *Coke*. The principle is, that there is no devise until the
 “ happening of the event, or performance of the terms upon
 “ which the disposition is made; a principle which applies to
 “ every case, so that although the condition require the perform-
 “ ance of an *impossible* act, as for the devisee to go to Paris in
 “ half an hour, or it require the devisee to do an *illegal* act, as
 “ to kill *B* or to burn his house (conditions *mala in se*); or
 “ whether it require a woman to separate from her husband (a
 “ condition against the policy of law); or whether the devise be
 “ made on condition that the legatee have criminal connexion
 “ with a particular person (a condition *contra bonos mores*); the
 “ before stated principle authorizes the conclusion, that, as all
 “ such conditions are void, the dispositions to arise only upon
 “ their performance are also void. But the rule of the civil law
 “ is different.”

This, however, is a gift of personalty, and different rules
 apply drawn from the ecclesiastical law which contains a great
 number of refinements on the subject, vide Swinburne on
 Wills, 7th ed., vol. 1, p. 387, and those which follow. This
 work, however, deals with the ecclesiastical law, and not all
 its niceties were adopted by the courts of equity when they
 took over the administration of estates from the ecclesiastical
 courts. A deal of learning on this subject is to be found
 in *In re Moore*.¹³ See the judgment of Cotton L.J.,¹⁴ where is
 the following citation from Jarman on Wills, 4th ed., vol. II,
 p. 12: “ The rule is thus stated by Mr. Jarman: ‘ But with
 “ ‘ respect to legacies out of personal estate, the civil law,
 “ ‘ which in this respect has been adopted by courts of equity,
 “ ‘ differs in some respects from the common law in its treat-
 “ ‘ ment of conditions precedent; the rule of the civil law being
 “ ‘ that where a condition precedent is originally impossible, or
 “ ‘ is made so by the act or default of the testator, or is illegal
 “ ‘ as involving *malum prohibitum*, the bequest is absolute, just
 “ ‘ as if the condition had been subsequent. But where the
 “ ‘ performance of the condition is the sole motive of the bequest,
 “ ‘ or its impossibility was unknown to the testator, or the
 “ ‘ condition which was possible in its creation has since become
 “ ‘ impossible by the act of God, or where it is illegal as involving
 “ ‘ *malum in se*, in these cases the civil agrees with the common

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¹³ (1888) 39 Ch.D. 116.¹⁴ *Ibid.* 128.

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“ ‘law in holding both gift and condition void.’ According to English law if a condition subsequent which is to defeat an estate, is against the policy of the law, the gift is absolute, but if the illegal condition is precedent there is no gift. In the civil law a distinction is taken between what is *malum in se* and what is only *malum prohibitum*. . . .”

It was argued before me that the present case was governed by the decision of Bennett J. in *In re Thomas's Will Trusts*.¹⁵ In that case the testator was desirous of pledging his legatee to pursue an action in which the testator had been engaged connected with an undivided share in real property. Before the date of the will, however, this undivided share was converted into personal property by the Law of Property Act, 1925, and therefore the pursuit of the action had become impossible. Bennett J. held that the condition was not binding, and relied on a passage in Swinburne quoted in the report, but with all deference to him, it seems doubtful whether that passage sufficed. because the judge did not notice an exception which apparently provides that where the impossibility was unknown to the testator the gift is avoided. However that may be, that case does not in my opinion govern the present. That was a case of impossibility, it being physically impossible to bring an action about something which did not exist. There is no such impossibility here; there is only illegality.

Precedent conditions which are illegal are dealt with in Roper, loc. cit., at p. 757: “ It is a rule of the civil law, that, if a precedent condition require the performance of an act *malum in se*, as to kill B, burn his house, etc.; not only the condition, but the disposition itself is void; a rule, which being in unison with the common law in devises of real estate, it is presumed that similar dispositions of personal property will receive the like construction in courts of equity. When, however, the illegality of the condition does not concern any thing *malum in se*, but is merely against a rule or the policy of law, the condition only is void, and the bequest single and good; for the condition not being lawful, it is held in the phrase of the civil law *pro non adjecta*.”

It appears from this passage that if the illegality involve *malum in se* the disposition is void, but if it be merely *malum prohibitum* then the condition is void and the bequest good. The present illegality is of the second kind, and, therefore, if this

¹⁵ [1930] 2 Ch. 67.

doctrine of the civil law has been imported into the English law, the condition can be disregarded. Mr. Roper is of the opinion that this rule was imported into equity, and for this there appears to be the authority of Lord Hardwicke L.C. in *Reynish v. Martin*,¹⁶ quoted and accepted by Bowen L.J. in *In re Moore*.¹⁷ This view is also agreeable to the observations of Mr. Jarman already cited above, which only states that illegality avoids the gift where it involves *malum in se*. I conclude, therefore, that the condition is avoided. If this be so, the gift is what the older authorities call pure and may be accepted by the legatee. Treating it, therefore, as a gift unfettered by a condition, I conclude that the first defendant can take the residue and disregard the condition.

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Declaration accordingly.

Solicitors: *Wright & Bull, for R. W. Skinner & Son, Burton-on-Trent; Sharpe, Pritchard & Co.; George Thatcher & Son, for A. H. and H. W. Timms, Burton-on-Trent.*

I. G. R. M.

¹⁶ (1746) 3 Atk. 330, 332.¹⁷ 39 Ch.D. 116, 131.

STROMDALE & BALL LD. v. BURDEN.

DANCK-
WERTS J.

[1949 S. 5543.]

 1951
 Nov. 5, 6,
 26, 29.

Landlord and tenant—Licence to tenant to assign—Assignees not parties to licence—Option to assignees to purchase in licence—Right of assignees to enforce option—Specific performance—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 56 (1).

If a document bearing wax, wafer or other indication of a seal be signed with the intention of executing it as a deed, that is sufficient adoption or recognition of the seal to amount to due execution of the document as a deed.

In re Smith (1892) 67 L.T. 64 and statement in Norton on Deeds, 2nd ed. (1928), at p. 7 considered.

By section 56 (1) of the Law of Property Act, 1925: "A person
 "may take an immediate or other interest in land or other
 "property, or the benefit of any condition, right of entry, covenant
 "or agreement over or respecting land or other property, although
 "he may not be named as a party to the conveyance or other
 "instrument."

DANCK-
WERTS J.

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STROMDALE
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v.

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A licence by deed inter partes was granted by a landlord (the under-lessee of a house containing three floors) to two tenants to assign their term of years in the ground floor of the premises to a named assignee^S who was not a party to the deed. The licence contained an option to the assignee during the term to purchase the landlord's leasehold interest in the whole house at a price stated. The assignment by the two tenants was executed and the assignee purported to exercise the option during the term:—

Held, that, for the purposes of section 56 (1), the "land" was the landlord's house and the option to purchase the leasehold interest in that land created an interest in that land and was an agreement respecting that land and so came within the precise words of the subsection. Accordingly the assignee, although not a party to the licence, could obtain specific performance of the option.

Observations of Simonds J. in *White v. Bijou Mansions Ltd.* [1937] Ch. 610, 624, and of Sir Wilfrid Greene M.R. in *White v. Bijou Mansions Ltd.* [1938] Ch. 351, 365, considered and applied.

ACTION.

The plaintiff company claimed specific performance by the defendant, Mrs. Mary Anne Burden, of an alleged agreement for the sale of leasehold premises, constituted by an option in a deed of licence dated March 16, 1948, and a notice dated August 19, 1948. The defendant pleaded that the plaintiff company were not parties to the deed of licence and therefore could not enforce it, and by her amended defence she denied that she had sealed the document and therefore denied that it had ever had the legal effect of a deed. Further or alternatively she pleaded that she had signed it by mistake, but this plea the judge negatived. Other topics which do not call for report were considered.

The following statement of the facts material to this report is taken in substance from the written judgment of Danckwerts J.:

In 1946 the defendant was the tenant of a house of three storeys, with a café business on the ground floor, known as No. 40 Romford Road, Stratford, under an underlease dated March 25, 1895. The term of the underlease was for 99 years from September 29, 1892 (less one day), so that in 1946 the defendant had an unexpired term of 45 years. The rent was £12 per annum, and the underlease contained full repairing covenants. There was no restriction on assignment, but the lessee was required to register any assignment, underlease or other assurance with the landlords and to pay a registration fee of £1 1s. 0d. The defendant had been carrying on the café business on the ground floor and in 1946 she sold the goodwill of the business to William Dennison and William John Rosengrave

for the sum of £1,200, with a further £150 for fixtures and fittings. On October, 25, 1946, she granted Dennison and Rosengrave a tenancy of the ground floor of the property for the term of three years from October 25, 1946, at a weekly rent of £2 inclusive of rates.

The tenancy agreement of October 25, 1946, conferred on the tenants an option exercisable by notice in writing at any time before the expiration of the term thereby granted to take a full repairing lease of the same premises for a further term of seven years.

On October 20, 1947, Messrs. Herrington & Carmichael, on behalf of the tenants, gave notice in writing exercising the option to take a lease for a further term of seven years. Negotiations for the preparation of this new lease proceeded between the solicitors, and by December 3, 1947, the lease and counterpart had been agreed and engrossed for signature, but completion was held up.

On February 4, 1948, Messrs. Herrington & Carmichael, on behalf of the tenants, wrote to Messrs. Woodman, Matthews & Co., solicitors of the defendant, informing them that Dennison and Rosengrave were selling the business to Stromdale & Ball Ltd., the plaintiff company, and asking for a licence to assign the term to the company, and after negotiations between the solicitors, conducted entirely by correspondence, a deed of licence was agreed and engrossed and was executed on March 16, 1948. That document was made between the defendant of the first part, William Dennison and William John Rosengrave (the tenants) of the second part, and Charles William Stromdale and Stanley Ball, directors of the plaintiff company and called "the sureties," of the third part. The document recited the agreement of October 25, 1946, and that the tenants desired to assign all their estate and interest in the demised premises to the plaintiff company. It contained a licence to assign by the defendant; a joint and several covenant by the directors guaranteeing payment of the rent so long as the term granted by the agreement should be vested in the company; and a restriction limiting the licence to the single occasion in question. Clause 4, on which this action was based, was in the following terms: "4. . . . If "during the continuance of the agreement the company shall be "desirous of purchasing the unexpired residue of the term of "years in the premises granted by the lease dated March 25, "1895, and made between George Chambers and Charles "Augustus Masters of the one part and Robert Bartram of the

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“ other part (hereinafter called ‘ the lease ’) subject to the pay-
“ ment of the rent thereby reserved and the lessee’s covenants
“ therein contained at the price of £1,250 and shall at any time
“ during the term granted by the agreement give to the land-
“ lord 14 days’ notice in writing of such desire the landlord
“ hereby covenants that she will at the expiration of such
“ notice and upon the payment of the said sum of £1,250
“ together with all rent reserved by the agreement up to the
“ actual date of completion assign all her interest in the residue
“ of the term granted by the lease unto the company.” Then
followed provisions as to investigation of the title.

It was not clear what was to happen to the tenants’ option to have a further term of seven years (which option they had duly exercised). That seemed simply to have been laid aside and disregarded.

The assignment by the tenants to the plaintiff company was completed on June 9, 1948, by a document by which, in consideration of £2,250 paid by the company, the tenants assigned to the company (1) all the property comprised in the agreement of October 25, 1946, and (2) all the goodwill of the café business. The habendum was “ unto the company for all the residue of the “ term created by the said agreement subject to the rents thereby “ secured and the tenants’ covenants and conditions therein “ contained and as to all other premises hereby assigned unto “ the company absolutely.” There was, therefore, no express reference to the option or to the benefit of the covenants on the landlord’s part.

On June 25, 1948, the deed of licence was registered under the Land Charges Act, 1925, as an “ estate contract.”

On August 19, 1948, the plaintiff company’s solicitors gave notice in writing of the intention of the company to exercise the option conferred by the deed of licence to acquire the defendant’s leasehold interest in No. 40 Romford Road, Stratford. No effective reply was received to the plaintiff company’s solicitors’ inquiries as to completion of the purchase, and finally, on December 16, 1949, the plaintiff company began this action for specific performance. There was a counterclaim by the defendant for possession, based on the fact that the original term of three years of the ground floor had expired, but this was dismissed.

J. A. Brightman for the plaintiff company. The option is quite clearly worded and the defendant cannot escape the consequence of its having been exercised by the notice. The evidence

shows that she executed the deed of licence which conferred the option, and it follows that the plaintiff company can enforce the option by virtue of section 56 (1) of the Law of Property Act, 1925. Accordingly, the court should grant specific performance.

Alan Bray for the defendant. The defendant does not admit that she executed the deed of licence. She neither sealed it nor did anything amounting to sealing it: (see Norton on Deeds (2nd ed., 1928), pp. 7 and 8). The evidence, so far from showing that she did so, shows that she did not. True, she read it before she signed it, but did not understand even its general purport, let alone that it bound her to part with her entire leasehold interest. Even if there was a seal on it (which she was not prepared to deny) she paid no regard to it; and she knew nothing of the option until the deed of licence was brought to her two days after she had signed it.

Thus, even if she did execute the deed, she thought that she was doing no more than grant to the tenants a licence to assign their own interest to the plaintiff company. Certainly she never thought that she was enabling the plaintiff company to acquire the whole of her own interest.

Further, the actual exercise of the option was expressly to be by the plaintiff company and by no one else. That is clear from the words "If . . . the company shall be desirous of purchasing. . . ." Nothing, clearly, was to happen until the plaintiff company had given the "notice in writing" which was to constitute the exercising of the option. The plaintiff company, however, are not a party to the deed, which, quoad the plaintiff company, is *res inter alios acta*. So also, therefore, is the option which, accordingly, is not enforceable in an action by the plaintiff company: *In re Miller's Agreement*.¹ True, it has been held that a registered transfer of land, containing a covenant by the transferee for repayment of moneys to a building society, and executed by the transferor and transferee but not by the building society, was a deed, but not *inter partes*; and therefore that the building society, although not a party, could sue on the covenant: *Chelsea and Waltham Green Building Society v. Armstrong*.² Here, however, the deed of licence is *inter partes*.

Further, section 56 (1) of the Law of Property Act, 1925, applies only to covenants running with the land: *Forster v. Elvet Colliery Co.*³ True, again, Lord Macnaghten was not sure

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¹ [1947] Ch. 615.

³ [1908] 1 K.B. 629.

² [1951] Ch. 853.

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of that: *Dyson v. Forster*.⁴ Even so, in a later case, the Court of Appeal was of opinion that section 56 (1) applied only to covenants running with the land or with the property: *Grant v. Edmondson*.⁵ The expression "running with the land" has to be very strictly interpreted. Thus, in the case of a lease, even a covenant or proviso whereunder the lessee has the right to buy the freehold reversion is not a provision "running with" (*i.e.*, directly affecting or concerning) the land, if the land be looked on, as it must be, as the subject-matter of the lease, and not of the freehold reversion. Accordingly, such a covenant does not run with the land so as to bind heirs and assigns under the Act 32 Hen. 8, c. 34: *Woodall v. Clifton*⁶; *Sherwood v. Tucker*.⁷ Accordingly, in the present case the clause giving the option in the deed of licence does not run with the property, so that the plaintiff company cannot rely on section 56 (1).

J. A. Brightman in reply. It is wholly irrelevant that the defendant either did not know that the deed of licence contained the option or that, if she did know, she did not appreciate what followed from it. She alone made the mistake. The plaintiff company did not cause her to make it, and cannot be visited with the consequences of her having made it: *Howatson v. Webb*⁸; *Tamplin v. James*.⁹

As to the contention that an option to purchase the freehold contained in a covenant by a lessor with a lessee cannot attach to the lease, precisely the opposite has been held: *In re Adams and the Kensington Vestry*¹⁰; and it has been held also that, in a covenant giving an option to purchase, the word "assigns" means the persons entitled to the term as between them and the lessor, and to the benefit of the covenants entered into by the lessor and lessee respectively which run with the land demised: *Friary Holroyd and Healey's Breweries Ltd. v. Singleton*.¹¹ Also, the plaintiff company in the present case is claiming specific performance against the actual covenantor. That was not so in *Woodall v. Clifton*.¹² True, the benefit of the option was not expressly assigned to the company by the assignment of June 9, 1948; that, however, did not matter, for the term was assigned and the benefit of the option went with it.

⁴ [1909] A.C. 98.

⁵ [1931] 1 Ch. 1.

⁶ [1905] 2 Ch. 257.

⁷ [1924] 2 Ch. 440.

⁸ [1907] 1 Ch. 537.

⁹ (1880) 15 Ch.D. 215.

¹⁰ (1883) 24 Ch.D. 199.

¹¹ [1899] 1 Ch. 86.

¹² [1905] 2 Ch. 257.

Nor does it matter that the plaintiff company are not a party to the deed of licence creating the option; for in spite of that they can take whatever interest in land the option creates: *London & South Western Railway Co. v. Gomm*¹³; *White v. Bijou Mansions Ltd.*¹⁴ On August 19, 1948, they did so, by giving the notice and thereby accepting the offer which was constituted by the option. In this case, that offer is, as is contended for the plaintiff company, in a deed, and accordingly may well be irrevocable. If it is not, it must at least stand until the defendant expressly revokes it, which she never did.

The plaintiff company are therefore entitled to specific performance.

DANCKWERTS J., reading his judgment, stated the facts substantially as set out above and continued:—The main defence, involving questions of fact, is that if the defendant executed the deed of licence she did so believing that she was only signing a licence to assign, and that she never knew that the document contained an option to the company to purchase her leasehold property. This mistake is attributed, in the alternative, to all the parties to the deed of licence and to the defendant alone. Evidence of any mutual mistake by the parties is entirely absent. The defence really is, therefore, based on a mistake by defendant. There is no doubt that the defendant knew that the document was one which dealt with her property, and, therefore, it would appear that, even if there was contained in it a provision of which the defendant was unaware or which she did not understand, the facts are insufficient to support a defence of “non est factum,” and it is not a mistake for which the plaintiff company can be made to accept responsibility: *Howatson v. Webb*¹⁵; *Tamplin v. James*.¹⁶ However, it is not necessary to decide this question on any legal rule or principle, if I am not satisfied that there was any lack of knowledge of the insertion of the option on the defendant's part.

[His Lordship then reviewed the evidence on this point and came to the conclusion of fact that when the defendant signed the deed of licence she knew and appreciated that the deed contained a clause containing an option to purchase her leasehold interest in No. 40 Romford Road, and continued:]

Another point is taken which also depends on the defendant's evidence. It is said that as she merely signed the deed of

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¹³ (1882) 20 Ch.D. 562.

¹⁴ [1937] Ch. 610; [1938] Ch. 351.

¹⁵ [1907] 1 Ch. 537.

¹⁶ 15 Ch.D. 215, 217.

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licence and never did any act amounting to sealing, it was not effectively executed as a deed. I was referred by Mr. Bray to Norton on Deeds (2nd ed., 1928), at pp. 7 and 8, where the formalities required for the execution of deeds are discussed, and it is said there (quoting Montague Smith J.) that some act must be done "with the intention of sealing"; and reliance was placed on *In re Smith*,¹⁷ in which the document intended to be a bond bore the words "sealed with my seal" and was stated in the attestation clause to have been "signed, sealed and delivered," but the document bore no mark, wafer, or seal visible on the face of the document. It was held in that case that the document could not be treated as having been sealed. In the present case, the defendant's evidence is very vague whether the wafer seal was on the document when she signed it, and I think it unlikely that the wafer seal had not been placed on it before she was asked by the solicitors' clerk to sign. If it was there when she signed, the document was effectively executed as a deed. Time was when the placing of the party's seal was the essence of due execution; signature was not indeed necessary to make a deed valid: (see Norton on Deeds (2nd ed., 1928), at p. 7). But with the spread of education, the signature became of importance for the authentication of documents and, since 1925, has become essential by reason of the provisions of section 73 of the Law of Property Act, 1925. Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to me that, at the present day, if a party signs a document bearing wax or wafer or other indication of a seal, with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed.

Further, in the present case there is no doubt that when the document was sent by the defendant's solicitors to the solicitors of the plaintiff company it bore the description "deed of "licence," also the words "This deed witnesseth"; it stated that the parties to it had thereunto "set their hands and seals," it bore a red wafer seal opposite the defendant's signature, and it was attested by Messrs. Woodman, Matthews & Co.'s clerk, who stated that it was signed, sealed and delivered by the defendant. I am unable to see how the defendant can now be allowed to say that she did not seal the document and execute it as a deed. It seems to me the clearest case of estoppel possible.

¹⁷ (1892) 67 L.T. 64.

The next point which is taken for the defence involves some legal questions of difficulty or, at any rate, obscurity. It is pointed out that the plaintiff company were not a party to the deed of licence, though the option of purchase thereby conferred was to be exercised by the plaintiff company and by no one else. It is argued, therefore, that the deed of licence (and the option) are *res inter alios acta* and the plaintiff company is not in a position to enforce the option in an action: (see *In re Miller's Agreement*¹⁸). In *Chelsea and Walkham Green Building Society v. Armstrong*¹⁹ the building society were held by Vaisey J. to be entitled to enforce a covenant contained in a registered transfer to which the society was not a party, because the registered transfer, though a deed, was not a deed *inter partes*. In the present case it is clear that the deed of licence is a deed *inter partes*.

Section 56 of the Law of Property Act, 1925, was referred to in the last-mentioned case, but was not dealt with by Vaisey J. This section, which replaces section 5 of the Real Property Act, 1845, provides as follows: [His Lordship read subsection (1) and continued:] The true effect of this section and the section of the Real Property Act, 1845, which it replaces, has not yet been fully elucidated, and Mr. Bray argued that it would not assist the plaintiff company in the present case for the following reasons.

Mr. Bray says, first, that the authorities show that this section only applies to covenants "which run with the land," and he referred to *Forster v. Elvet Colliery Company*.²⁰ In this case the owners of surface lands were held entitled to enforce a covenant to pay compensation for damage caused by working coal mines, though they were not parties to the lease containing the covenant, by virtue of section 5 of the Real Property Act, 1845. The Court of Appeal thought that the section only applied to covenants that ran with the land. But on appeal, *sub nom. Dyson v. Forster*,²¹ though the decision was affirmed by the House of Lords, Lord Macnaghten, who was the only one of the Lords who stated reasons, doubted "whether the section must be "confined to covenants running with the land."

I was also referred to *Grant v. Edmondson*,²² in which it was held by the Court of Appeal that the benefit of a covenant to pay

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¹⁸ [1947] Ch. 615.

¹⁹ [1951] Ch. 853.

²⁰ [1908] 1 K.B. 629.

²¹ [1909] A.C. 98, 102.

²² [1931] 1 Ch. 1.

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a rentcharge does not run with the rentcharge at law, and the Court of Appeal expressed the view that section 5 of the Real Property Act, 1845, and section 56 of the Law of Property Act, 1925, did not affect the question, as those sections only applied to covenants which ran with the land or the property.

Mr. Bray then relied on *Woodall v. Clifton*²³ and *Sherwood v. Tucker*,²⁴ which establish that a covenant or proviso conferring on a lessee the right to purchase the freehold reversion is not a provision which directly affects or concerns the land, regarded as the subject-matter of the lease, and consequently such a covenant does not run with the leasehold interest in the land, so as to bind heirs or assigns under the provisions of the statute of 1540 (32 Hen. 8, c. 34). Accordingly, Mr. Bray argues that the provision conferring the option in the present case is not one which runs with the land, and the provisions of section 56 of the Law of Property Act, 1925, do not assist the plaintiff company.

Two cases, *In re Adams and the Kensington Vestry*²⁵ and *Friary Holroyd and Healey's Breweries Ltd. v. Singleton*,²⁶ on which Mr. Brightman, for the plaintiff company, relied in order to dispose of this argument, do not really assist him, because it appears that the question of covenants running with the land, as discussed in *Woodall v. Clifton*,²⁷ was not considered in these cases, which in any case were before the decision of the Court of Appeal in *Woodall v. Clifton*.²⁷ Mr. Brightman was, however, correct in pointing out that in *Woodall v. Clifton*²⁷ the action was an attempt to enforce the option to purchase the freehold reversion against an assign of the reversion, whereas in the present case the defendant is the actual person who gave the option. Mr. Brightman admitted that there is no assignment expressly to the company of the benefit of the option in the assignment of June 9, 1948, but he said that the benefit of the option would pass automatically with the assignment of the term. I am not satisfied, however, that these considerations are sufficient to get over the difficulties of the plaintiff company.

But Mr. Brightman relied on section 56 of the Law of Property Act, 1925, in a way somewhat different from that in which the section has been considered by me so far. Mr. Brightman referred me to *London and South Western Railway Co. v. Gomm*²⁸ as an authority showing that an option to purchase in

²³ [1905] 2 Ch. 257.

²⁴ [1924] 2 Ch. 440.

²⁵ 24 Ch.D. 199.

²⁶ [1899] 1 Ch. 86.

²⁷ [1905] 2 Ch. 257.

²⁸ 20 Ch.D. 562, 581.

equity creates an interest in land. Sir George Jessel M.R. said, in that case: "The right to call for a conveyance of the land is "an equitable interest or equitable estate. In the ordinary case "of a contract for purchase there is no doubt about this, and an "option for repurchase is not different in its nature. A person "exercising the option has to do two things: he has to give "notice of his intention to purchase, and to pay the purchase "money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without "his consent, and the right to take it away being vested in "another, the covenant giving the option must give that other "an interest in the land." It should be added that in the present case there is no difficulty under the rule against perpetuities, as there was in the case cited.

Mr. Brightman argues from this that section 56 of the Law of Property Act, 1925, enables the plaintiff company to take such an interest in land as is created by an option to purchase though not a party to the document conferring the option. In support of this argument, he referred me to certain decisions in which the provisions of the section were considered. In *White v. Bijou Mansions Ltd.*,²⁹ a case concerned with covenants restricting the use of land, Simonds J., referring to section 5 of the Real Property Act, 1845, after saying that the section had a limited operation, said: "It is intended to confer a benefit only on those "persons to whom the deed purports to grant an estate or "interest or those persons with whom there purports to be a "covenant or agreement," and he went on to say that the section did not create a benefit in favour of any persons who might like to avail themselves of it. With regard to section 56 of the Law of Property Act, 1925, Simonds J. said: "It appears "to one at once that, so far as any other than an immediate "interest in land is concerned, the section is superfluous, because "a person always could take another interest in land though not "a party. It is at least a question how far such a provision is "necessary at all in the case of personalty. Without deciding "it, I should be disposed to think that equitable estates even in "land were not subject to the old artificial rule and it is very "doubtful if an interest in personalty was ever so subject. However that may be, for the purposes of the present case, I think "I am only concerned with one aspect of this question. Just as "under section 5 of the Act of 1845 only that person could call

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²⁹ [1937] Ch. 610, 624.

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“ it in aid who, although not a party, yet was a grantee or
“ covenantee, so under section 56 of this Act only that person
“ can call it in aid who, although not named as a party to the
“ conveyance or other instrument, is yet a person to whom that
“ conveyance or other instrument purports to grant some thing
“ or with which some agreement or covenant is purported to be
“ made.”

In the same case, in the Court of Appeal, Sir Wilfrid Greene M.R. said ³⁰: “ Whatever else section 56 may mean, it is, I
“ think, confined to cases where the person seeking to take
“ advantage of it is a person within the benefit of the covenant
“ in question, if I may use that phrase.”

It seems to me that those statements of the limited effect of section 56 of the Law of Property Act, 1925, do none the less exactly cover the situation of the plaintiff company in the present case. I have not overlooked the decision of Crossman J. in *In re Foster* ³¹ expressly declining to treat section 56 as creating such an enormous change in the law as to enable an agreement by A with B to pay money to C to be enforced by C. But it seems to me that in the present case the intention of clause 4 of the deed of licence is to enable the person therein named, the plaintiff company, and no one else, to obtain the leasehold interest of the defendant in No. 40 Romford Road. In the language of Simonds J. the plaintiff company is a person to whom the instrument purports to grant some thing or with which some agreement or covenant is purported to be made. Section 56 provides that a person may take an immediate or other interest in land or the benefit of any covenant or agreement over or respecting land, although he may not be named as a party to the instrument. It is difficult to see what the intention of clause 4 of the deed of licence was if it was not to confer on the plaintiff company an interest in No. 40 Romford Road and to give to the plaintiff company the benefit of the covenant or agreement conferring an option to acquire the defendant's leasehold interest. The question decided in *Woodall v. Clifton*, ³² namely, whether an option to acquire the reversion in fee simple on a leasehold term ran with the leasehold term in the hands of an assignee of the reversion or of the term, seems to me to be a different matter. In the present case, for the purposes of section 56, the “ land ” is No. 40 Romford Road, and an option to purchase a leasehold

³⁰ [1938] Ch. 351, 365.

³¹ (1938) 159 L.T. 279.

³² [1905] 2 Ch. 257.

interest in this land seems to me to create an interest in that land and to be an agreement respecting that land, and so to be within the precise words of the section. I do not understand why the words "agreement respecting land" should not be given their plain meaning. An option to purchase land is an agreement respecting land. Accordingly, I reach the conclusion that the provisions of section 56 of the Law of Property Act, 1925, enable the plaintiff company to enforce the option in the present case.

Mr. Brightman, however, also rested his case on another argument which seems to me to be attractive. He said, and, as it seems to me, correctly, that an option is no more than an offer, which, if given for consideration or contained in a deed, may be irrevocable but in any case remains open for acceptance until it is revoked. It is plain that the defendant never had taken any steps to revoke the offer contained in the option in the present case before it was accepted by the plaintiff company on August 19, 1948 (even assuming, of course, that any such revocation was open to her). An offer must, of course, be accepted by the person to whom the offer is made and not by any other person: (see *Reynolds v. Atherton*,³³ a decision of the House of Lords). It is quite clear that the offer in the present case was made to the plaintiff company and was intended to be communicated to the plaintiff company, and it was accepted by the plaintiff company. There is, therefore, a complete contract which the plaintiff company is entitled to enforce by action.

[His Lordship then discussed and decided against the contention that specific performance ought not to be granted on the ground of hardship to the defendant, and concluded:] The counterclaim will be dismissed, and the defendant will pay the costs of the action and counterclaim down to this day.

I am very much indebted to both counsel for the assistance they have given me in this case, which I consider was very well argued.

Order for specific performance.

Solicitors: *Gustavus Thompson & Sons, for Herrington & Carmichael, Aldershot; Scott, Bell & Co.*

K. R. A. H.

³³ (1922) 127 L.T. 189.

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Restraint of Trade—Doctor—Partnership agreement—Retiring partner not to practise for twenty-one years within radius of ten miles from parish church—Covenant not wider than necessary for protection of partnership—Enforceability—National Health Service (Amendment) Act, 1949 (12, 13 & 14 Geo. 6, c. 93), s. 1.

Clause 21 of a partnership agreement between four doctors prohibited a retiring partner for a period of twenty-one years from practising within ten miles of the parish church of Atherstone. The principal surgery was at Atherstone, and the bulk of the practice was within five miles of Atherstone, although there were a number of patients between five and ten miles away. The partners were entered on the medical lists under the National Health Service Act, 1946. The Act came into force on July 5, 1948. On March 29, 1951, one of the partners gave notice of his intention to retire pursuant to the terms of the partnership agreement. He also claimed that cl. 21 was more extensive than the law permitted in a covenant in restraint of trade, and was therefore unenforceable. He declared that he intended to practise in the prohibited area after his retirement from the partnership. The remaining partners who had exercised their option to acquire his share of the practice sought to enforce the covenant:—

Held, by Danckwerts J. and the Court of Appeal, (1) that a limit of five miles was insufficient to protect the practice, and that as it was difficult to fix any limit between five and ten miles which would be sufficient, the area prohibited by cl. 21 was not more than was reasonably required for the protection of the practice, and the covenant was therefore enforceable.

(2) That the coming into force of the National Health Service Act, 1946, did not affect the covenant, the effect of which was preserved by section 1 of the National Health Service (Amendment) Act, 1949.

The effect of the words “directly or indirectly carrying on” in cl. 21 was considered by Evershed M.R.

ACTION.

The three plaintiffs, Dr. E. I. Whitehill, Dr. A. D. Egan and Dr. C. V. Spark, and the defendant, Dr. M. Bradford, carried on the business of general medical practitioners at Atherstone under a partnership agreement dated February 9, 1945, for a period of twenty-one years, subject to certain provisions relating to retirement. The partnership was in equal shares, and all professional fees and emoluments derived from the practice or appointments held by the partners were profits of the partnership. The defendant came to Atherstone for a trial period in January, 1945, before he entered into the partnership agreement. He was advised

by separate solicitors in the negotiations preceding the execution of the partnership deed.

By cl. 18 of the agreement the partners could retire from the practice by giving six months' notice in writing. Clause 19 of the agreement gave the continuing partners an option to purchase the share of a retiring partner. Clause 21 (which was the material clause in this action) provided: "A retiring and outgoing partner shall for the period of twenty-one years from the date of such retirement be prohibited from directly or indirectly carrying on or being interested or concerned in carrying on the business or profession of medicine, surgery, midwifery or pharmacy or any branch thereof anywhere within a radius of ten miles of the parish church of Atherstone . . . but the above prohibition shall only apply to a retiring or outgoing partner carrying on or being interested or concerned in the profession of a general medical practitioner."

Atherstone is a market town in Warwickshire, situate on Watling Street, which traversed the area of ten miles mentioned in cl. 21, from north-west to south-east. A large proportion of the area within the circle of ten miles was of a rural nature, but there were also considerable industrial areas, namely, Tamworth, Hinckley and Nuneaton, and towards Coventry in the south, and towards Coleshill and Birmingham in the south-west. The principal surgery of the practice was at Atherstone, but there were two others. The bulk of the practice was south of the line of Watling Street, and the greater proportion of it was within five miles of Atherstone, although there were a number of patients between the limits of five and ten miles of Atherstone.

In 1945 there were a certain number of National Insurance Act (panel) patients, and also some private patients. The plaintiffs and the defendant were entered on the medical lists of the Warwickshire and Leicestershire executive council under the National Health Service Act, 1946. The Act came into force on July 5, 1948; and to some extent the nature of the practice was altered under the régime introduced by the Act.

On March 29, 1951, after a dispute between the partners, the defendant gave notice under cl. 18 of the agreement of his intention to retire from the partnership on September 29, 1951. The notice was accompanied by a letter from his solicitors alleging that cl. 21 of the partnership agreement was void as being contrary to public policy. In April, 1951, they wrote stating that on the expiration of the notice the defendant intended to practise

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within the area specified in cl. 21 among the 4,000 patients on his list. There were some 13,000 patients on the books or lists of the partnership at that date.

The plaintiffs had exercised their option to purchase the defendant's share on April 25, 1951. By this action they sought to enforce cl. 21.

Henry Salt K.C. and H. E. Francis for the plaintiffs. This is not a master and servant covenant but a mutual covenant between four partners at the outset of their association in February, 1945, before the National Health Service Acts, 1946-1949, came into operation. All parties were *sui juris* and the articles (including the restrictive covenant of which the benefit and burden might accrue according to who might thereafter prove to be the retiring partner) were carefully considered by them with their respective solicitors. The moment for considering whether the restriction is reasonable between the parties is the date of the mutual imposition and acceptance of it: see *Putsman v. Taylor*,¹ and *Lindley on Partnership* (11th ed.), pp. 531-533. It is some evidence of its reasonableness that all four partners agreed. This is always a question for the judge, not the jury, and must depend on all the circumstances at the outset in each case.

Having regard to the nature and extent of this practice and the means of communication available to patients for attending the surgeries and to a doctor for visiting the patients, a ten-mile radius is not too wide, notwithstanding that the "density" of the partnership's clientèle tends to become thinner towards the outer edge of the circle. Nothing short of ten miles would suffice. A covenant in terms of area and time is at least as old as 1818: see *Hayward v. Young*,² where a bond by an apothecary which contained a condition not to set up as a surgeon or man-midwife in Aylesbury or within twenty miles (which included Oxford), was held valid and enforceable and not in unreasonable restraint of trade. In cases of medical partnership protection of a reasonable fringe and not only the heart of the practice is permissible. A patient will turn to the doctor he knows personally if the doctor is accessible to him, and vice versa.

The question is what could be properly estimated in 1945 and 1946 by the plaintiffs and the defendant as a reasonable, not as a mathematically precise, closed area for the protection of

¹ [1927] 1 K.B. 637, 643.

² (1818) 2 Chitty 407.

those who should continue the practice, and acquire the entire goodwill vis-à-vis any of them who should retire and transfer his share of goodwill. [They referred to *Routh v. Jones*.³]

As to the time element, twenty-one years from the date of retirement was not too long in a case where the relation of doctor and patient arose. A whole life covenant was upheld by the House of Lords in the case of a solicitor's managing clerk (not a partner) in *Fitch v. Dewes*.⁴

As to the interest of the public, there is nothing to prevent any practitioner other than the defendant from practising in the area. The primary public interest is that parties who, being in an equal position of bargaining, make contracts, should be compelled to perform them, and not to escape from their liabilities by saying that they had agreed to something which was unreasonable: see *English Hop Growers Ltd. v. Dering*.⁵ In that respect the burden rests on the defendant.

Nothing in the National Health Service Acts, 1946 and 1949, extinguished goodwill.⁶ The rendering of it unsaleable did not deprive the continuing partners of an economic interest to protect. The right to acquire (as the plaintiffs did in April, 1951) the defendant's share survived and so did the covenant: see National Health Service (Amendment) Act, 1949, s. 1 (1) (3) (5) (10) (11) and (12) which had retrospective operation.

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³ [1947] 1 All E.R. 758.

⁴ [1921] 2 A.C. 158.

⁵ [1928] 2 K.B. 174.

⁶ National Health Service (Amendment) Act, 1949, s. 1: "(1) This section applies to any partnership agreement in force on and immediately before the appointed day between medical practitioners one at least of whose names was entered on that day on a list of medical practitioners undertaking to provide general medical services.

"(3) Section 35 of the National Health Service Act, 1946 . . . which prohibits the sale of medical practices, shall not affect . . . the exercise or performance under any partnership agreement . . . of any right or obligation of a partner to sell to, or purchase from, another partner any share in the goodwill of the partnership practice. . . .

"(5) Where any agreement to which this section applies . . . con-

"fers an option on a listed . . .
"partner to purchase the share of
"another partner being a listed part-
"ner in the goodwill of the partner-
"ship practice, and, in the case
"of an option, the option has been
"exercised, that share shall be trans-
"ferred . . . on the terms (except as
"to the payment of the purchase
"price) provided in the agreement
"and there shall be paid to the
"partner from whom the share is
"transferred . . . compensation . . .
"in respect of that share.

"(12) Where any agreement to which this section applies contains provisions which take effect on the purchase of any share . . . of the goodwill of the partnership practice, those provisions shall take effect in like manner on the transfer of that share . . . notwithstanding that the transfer does not constitute a purchase."

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Ingram J. Lindner for the defendant. As between covenantor and covenantee this covenant is more than is reasonably necessary in space and time for the protection of the "practice," which is the only legitimate object of protection: see *British Reinforced Concrete Engineering Co. v. Schelff*.⁷ The limit of ten miles is not justified by the circumstances of the practice; a limit of two or three miles would be a sufficient protection, and a five-mile radius is the utmost which could be reasonably required.

Over 99 per cent. of the practice came from within a radius of five miles, and over 90 per cent. of it was south of Watling Street. Even if it be necessary to provide some "fringe" of protection, as suggested by Cohen L.J. in *Routh v. Jones*,⁸ a fringe of two miles would be adequate, making the radius seven miles. In this connexion the executive committees make no provision for a "mileage" charge beyond seven miles from the practice; this indicates what is a reasonable area for a restriction.

The area covered by the covenant includes Nuneaton, Hinckley, Tamworth, Bedworth and the outskirts of Coventry. All these towns have large populations and none of the practice (with a few exceptions) was drawn from them. It is not reasonable that a retiring partner should be excluded from practising in these towns in order to protect a practice confined in substance to Atherstone.

The personnel of the practice, its general setting and transport facilities should also be considered in determining what is reasonable. The practice consisted almost entirely of working class persons and the transport facilities were poor. It was not a small country practice requiring the support of a country hinterland; it was a small town practice within the line of development of a rapidly expanding industrial and urban district, and required a far more limited area of restriction than a country practice.

The period of twenty-one years from the date of the retirement of a partner is far too long. The duration of the partnership (unless otherwise broken by retirement) is for twenty-one years; that means the defendant is precluded for forty-two years from practising in this area on his own. It is a virtual life exclusion. The minimum period for which the covenant would run is twenty-six years; even that is unreasonably long. The plaintiffs have not discharged the onus which rests on them on this aspect of the case.

A covenant in restraint of trade must also be looked at from the point of view of the public. The scope of this covenant is contrary to public interest. There is no case where a covenant

⁷ [1921] 2 Ch. 563.

⁸ [1947] 1 All E.R. 758, 764.

has been held unreasonable with regard to the parties and reasonable with regard to the public: see *Connors Bros. Ltd. v. Connors*,⁹ and *Herbert Morris Ltd. v. Saxelby*.¹⁰

Since 1911 and more especially since 1948 the public have an interest in the services of any particular doctor. There is no reason why the 4,000 patients on his list should be deprived of his services. The interests of the public towards the profession should carry some weight.

Since the National Health Service Act has come into force the sale of doctors' practices has been prohibited. But on the transfer of a partnership the provisions in the partnership agreement remain effective: see section 1 (5) of the National Health Service (Amendment) Act, 1949. On the retirement of a partner out of the area the State pays him compensation in respect of his share, here one-quarter, instead of his partners' purchasing his share. It is in the public interest, therefore, that an injunction should not be granted to prevent him practising in the area, and that State money should not be thus spent.

There is no reason for the court to grant an injunction; if any remedy be granted damages would be adequate, but at the most the damages should be nominal. The continuing partners have not suffered any pecuniary loss, because they are not paying for the goodwill. The basis on which the court intervenes is to protect property; but the plaintiffs are claiming something in respect of which they have no property; there is now a sort of State public property in doctors' practices.

Salt K.C. in reply. It is fallacious to suggest that the plaintiffs, having acquired the defendant's share in goodwill by exercising their option in April, 1951, under cl. 19 of the partnership articles, had no economic interest to protect. The compensation moneys in respect of the defendant's share become payable (at a time which chiefly, if not wholly, rests with the defendant) to the defendant over the heads of the plaintiffs and indirectly at their expense. The plaintiffs would otherwise have been entitled to them, and have had to pay them to the defendant in lieu of the cash value of his share.

The defendant is really driven to argue that the covenant is unreasonably wide from the point of view of public interest. *English Hop Growers Ltd. v. Dering*¹¹ is an answer to that argument. [He was stopped.]

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⁹ [1940] 4 All E.R. 179.

¹¹ [1928] 2 K.B. 174.

¹⁰ [1916] 1 A.C. 688, 715.

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DANCKWERTS J., having stated the facts:—The issue which I have to determine is whether the covenant is too wide and therefore unenforceable, or whether it is not more severe than is required to protect the interests of the continuing partners. Under the terms of the partnership deed, they had an option to purchase the share of the outgoing partner and on April 25, 1951, they exercised that option. Since this is a covenant in restraint of trade, according to the authorities—which are well known by now—it is on the plaintiffs, in order to succeed in this action, to show that the terms of the covenant are not wider than is required for the protection of the practice, which, under the terms of the deed came into the sole ownership of the plaintiffs.

All such cases depend upon the circumstances of the actual case. A large part of the practice undoubtedly was with patients residing within a circle of five miles from the parish church of Atherstone and the greater number of them south of the line of Watling Street. On the other hand, there were a good number of patients scattered round the whole of the circle, though not very many near the periphery of ten miles. Some of those patients, according to the evidence, were more lucrative ones—farmers and the like—in 1945 than the great bulk of the poorer patients to be found nearer to Atherstone.

It has been argued on behalf of the defendant that a circle of five miles would be quite adequate for the protection of the practice and, therefore, a circle of ten miles exceeds what is required. I have come to the conclusion that that is not a satisfactory argument, because if the circle were only a circle of five miles from which the defendant was excluded from practice, he might be entitled to set up a surgery immediately outside the circle of five miles and thereby enable himself to draw upon the patients among whom he had previously practised and, therefore, deprive the plaintiffs of the likelihood that those patients would continue to resort to the partnership and the partnership premises with which they were acquainted.

There are bus services one way and another on a good many of these roads, and some perhaps rather inferior train services. These facilities have been criticized on behalf of the defendant, but if the patients are able to go in one direction, it seems to me that they are able to go in another direction, the reverse way. If, therefore, the defendant were able to set up a surgery in some selective locality such as Nuneaton, which is outside five miles but a good way within ten miles of the base of operations at

Atherstone, patients well acquainted with him might cling to the doctor whom they knew and go to him at his new surgery, and not to the old surgery which is left to the continuing partners.

There is, of course, the question of visits. Each of the four doctors, naturally, had a motor-car, and in these days of motor-cars, distances are easily covered if the doctor so desires. It was suggested on behalf of the defendant that as a result of the National Health Service Acts, doctors were less willing to go distances in their cars and had enough work to do by merely seeing the patients who came to them in their surgeries; but obviously that would not cover patients who were seriously ill and who could not travel even one mile. In that case, the doctor would have to go to the patient.

It seems to me that it is difficult to set a limit narrower than, say, ten miles, which is not a great distance in these days, within which patients would be unlikely to continue to resort to their old doctor and would not simply continue to go to the original place. I, therefore, am compelled to the conclusion that five miles would be an insufficient limit for the protection of the plaintiffs' practice of general practitioners, and it is difficult, as far as I can see, to fix any limit within five and ten miles which would obviously be sufficient. It is rather difficult (in a case, at any rate, of a doctor's practice) to be definite about these things, but in my opinion the limit of ten miles is not an unreasonable area for the protection of the plaintiffs' practice.

I am fortified in reaching this conclusion (though I reach it without the aid of this circumstance) that in February, 1945, and in April, 1946, the terms of the partnership deed were considered with legal advice on behalf of the four partners. It is obvious that the terms of the covenant in question were carefully considered, and all four partners in each case were obviously of opinion that a limit of ten miles was a reasonable and proper restriction. It is plain that in drawing up the deed of February 9, 1945, the question of this covenant must have been carefully considered by the legal advisers acting on behalf of the defendant as well as the plaintiffs, because a draft deed was produced to me in which alterations had been made, so that the covenant did not simply slip in without consideration.

It seems to me that when four persons of full age and supposed to know their own business agree together on a certain limit, it is, at any rate, some evidence that that, from their professional point of view, is a limit which is good and proper. It is to be

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remembered that this is not a case where a restriction has been forced by an employer upon a young employee newly entering his service, or even the case of a vendor of a business who is going elsewhere and selling his business to a purchaser; it is a case of four people entering into restrictions of which each of the four may have the advantage as well as being subject to the burden; and, therefore, there is some evidence that this was a fair matter as between the four of them.

Accordingly, therefore, apart from the National Health Service Acts, I come to the conclusion that the plaintiffs have established the burden of showing that the area within ten miles of the parish church of Atherstone is not too wide and is not unduly arduous for the protection of the practice which they have acquired from the defendant.

There remains to consider the point which might arise as a result of the National Health Service Acts, under which the sale and purchase of practices of doctors was forbidden. One might have thought that the legislature would have prohibited restrictions of this kind being placed upon retiring doctors. It was indeed argued, apart from the Act, that public policy required that I should not give effect to this covenant in the interests of the public, who would be deprived of the services of Dr. Bradford; but that argument does not carry much weight, because although this was an area in which doctors were not too numerous—I was informed that it was what was known as an “open” area, that is to say, other doctors could come there—the effect of the covenant is not to create a monopoly in the plaintiffs but merely to prevent one doctor, the defendant, from practising there.

It appears from the National Health Service (Amendment) Act, 1949, that the effect of a covenant of this kind has been preserved. The material provisions are in section 1 of the Act. [His Lordship read subsections (1) (3) (5) and (12) of section 1 of the Act.]

The result of those provisions seems to be that the purchase price is no longer payable by the partners who purchase the share of the outgoing partner, but the outgoing partner will receive—one-quarter share, in the present case—compensation moneys for the goodwill of the practice, and the other three, therefore, will lose their right to that as a result of having purchased his share. They will not get that quarter which they might have got if the Act had not so provided by reason of the purchase of the share of the outgoing partner. The result seems to be, therefore, that

the terms of the partnership deed including this restriction are not in any way affected by the Act and, therefore, appear to be fully enforceable.

It was argued that there was no loss to the continuing partners by reason of the Act; that is not a fair construction or a fair proposition, having regard to the result which arises from the Act. There is no reason therefore why the continuing partners are not entitled to enforce the provisions of cl. 21 of the partnership deed. That being so, the plaintiffs' action succeeds, and it seems to me a case in which I ought to protect their rights by granting an injunction.

I. G. R. M.

The defendant appealed.

Ingram J. Lindner for the defendant.

Henry Salt K.C. and *H. E. Francis* for the plaintiffs.

The arguments were substantially the same as before *Danck-werts J.*

EVERSHED M.R. The proceedings in the present case afford another illustration of the difficult topic which finds many expressions in the Law Reports, namely, that of covenants in restraint of trade. The topic is notoriously troublesome, and I confess that I have not found the present case an easy one. I do not propose to add to what Lord Birkenhead in *Fitch v. Dewes*¹² called the generous elucidation of the law in relation to these matters, in that regard adhering to my own example in *Routh v. Jones*.¹³ Indeed, the principles may be taken now to be well established, the difficulty being that of their application to the facts of particular cases. It must be said at once that the court is here dealing with a covenant entered into mutually between four partners upon the occasion of their executing a partnership agreement for the purpose of carrying on together as partners the business or profession of general medical practitioners.

In cases between master and servant it is, I think, clear that the court looks closely into the terms of any covenant entered into by the servant, and it is not disposed to enforce such a covenant if it goes further than is reasonably necessary to protect some subject-matter of contract or proprietary interest legitimately entitled to protection. This approach is adopted by the court, first, because a servant on such occasions is necessarily at some

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¹² [1921] 2 A.C. 158.

¹³ [1947] 1 All E.R. 758.

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disadvantage vis-à-vis his employer when the service agreement is made; and, secondly, because it is contrary to the general policy of the law that a man should be impeded in earning his livelihood, according to his own trade, business or profession, more than is properly requisite for the due protection of his master. In cases arising between vendor and purchaser, or in cases such as the present of mutual covenants between professional men, the test of reasonableness must at the end of all always remain. But in the last-mentioned class of case there is always a proper subject-matter for protection, and that protection comprehends that which it does not comprehend in master and servant cases, namely, protection against competition. In the class of cases with which we are now concerned it is apparent from the cases in the books that the court applies a reasonable construction to the language used. The court will not, I conceive, look for fanciful or extravagant possibilities and then reject the covenant because it may be said that some one or more of such possibilities might be comprehended by the strict language of the covenant. If there is in the cases now under discussion a general policy of the law that a man should not be unduly hampered in his capacity to carry on his trade or profession, it is also the policy of the law that contracts freely entered into should *prima facie* be enforced.

I have said that the present case is one of contract between doctors for the purpose of establishing between them a partnership business in their practice as general medical practitioners. They were (as Mr. Salt has observed) all of them grown and educated men and they were also separately advised. Those matters, of course, are by no means conclusive. For one thing it is not shown that they were rightly advised. But there is some significance in the facts that I have mentioned, for at least these four persons (each of them with medical qualifications) must be taken to have known what was comprehended, and what they intended should be comprehended, within the ambit of the practice on which they were together embarking, and in what manner such a practice or profession would be liable to be injured by competition. To that extent I think the facts that I have mentioned are relevant, and I am not sure that Mr. Lindner did not so concede; but at the end of all the question to be determined has to be determined not upon the understanding between the parties but upon the view taken by the court.

I turn accordingly to the partnership deed which was made on February 9, 1945. The parties were Dr. Fisher, Dr. Whitehill,

Dr. Egan and Dr. Bradford. The second clause provided that the partnership should begin on February 1, 1945, and should continue for the period of twenty-one years, determinable as therein provided. I have said that the business to be carried on was that of general medical practitioners, in continuation of a like business formerly carried on by other persons who are referred to. I suppose most people have in their minds a general idea of what exactly is comprehended by practice as a general medical practitioner; but, as Lord Greene pointed out,¹⁴ it is not proper for members of the court to rely too much on individual knowledge of these matters; and, indeed, there is some (though it is small) evidence of the nature of such a practice, and I take it from the answer given by the first plaintiff, Dr. Whitehill. He was asked what he meant by "general medical practitioner," and his answer was: "We undertook to advise and treat all cases of medicine, "midwifery and surgery. Any cases requiring specialized treatment we would send to the consultants concerned."

I should say here that the partnership deed having been made in February, 1945, not long afterwards Dr. Fisher (who was considerably senior to the others) retired; and Dr. Spark was introduced as a new partner. In April, 1946, a deed was entered into whereby it was agreed that Dr. Spark should enter the business. On that occasion the covenant which is now in suit was reaffirmed by the old partners and also accepted by Dr. Spark.

Provision is made in cl. 18 and 19 of the agreement for retirement. The relevant clause as far as this case is concerned is cl. 19, which provided that a partner (after a certain interval in the case of Dr. Bradford) could serve notice determining the partnership, and the other partners thereupon had an option (which was exercised when Dr. Bradford proposed leaving the partnership) of acquiring his share in the business of the outgoing partner. I come to cl. 21: "A retiring and outgoing partner "shall for the period of twenty-one years from the date of such "retirement be prohibited from directly or indirectly carrying on "or being interested or concerned in carrying on the business or "profession of medicine, surgery, midwifery or pharmacy or any "branch thereof anywhere within a radius of ten miles of the "parish church of Atherstone aforesaid under a forfeiture of one "thousand pounds to be payable as liquidated damages and not "as a penalty and without prejudice to the right of the continuing "partner or partners his or their successors or assigns to an

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¹⁴ [1947] 1 All E.R. 758, 761.

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BRADFORD. " medical practitioner."

Evershed M.R. The first duty of the court is to construe that clause, and those responsible for its final formulation rendered the task somewhat more difficult by the unusual method of first of all stating a prohibition and then appending three lines at the end with the obvious intention of limiting in some regard the extent of the prohibition originally inserted. The difficulty is evidenced by the fact that in the appendage at the end not all the adverbs and other words to which recourse has been had with some liberality in the earlier part of the clause were repeated. So it is first of all a question whether the words " directly or indirectly " are by the effect of what I have called the appendage eliminated from the prohibition. It is also to be noticed that whereas in the main part of the clause the formula is used " interested or concerned " in carrying on the business or profession ", in the appendage the phrase is " interested or concerned in the profession." Doing the best I can, the construction which I give to this clause does not have the effect of eliminating from the covenant the language " directly or indirectly." I think the true effect of the appendage was to limit what otherwise might have been the scope of the phrase " the business or profession of medicine, surgery, midwifery or pharmacy." Without the appendage the result would on the face of it have been to have prevented an outgoing partner from carrying on any one of those professions as a specialist, for example, as a specialist surgeon. Such an activity would not *prima facie* have involved any competition with the general medical practice carried on by the firm as Dr. Whitehill stated in the passage I have read. In cases requiring a specialist they would send the patient to a specialist and not treat him or her themselves. I think, therefore, that the effect of those added words at the end was to limit the prohibition only in this regard, that the ban on the exercise of the arts of medicine, surgery, midwifery or pharmacy was limited to their exercise as part of or in connexion with the profession of a general medical practitioner. The result, therefore, for practical purposes, I think, is the same as though, instead of saying " the business or profession of medicine, surgery, midwifery or pharmacy," it had read " the business or profession of a general medical practitioner." That, so far at any rate as this case is concerned, is the effect. There remains,

accordingly, as part of the prohibition the somewhat wide and vague formula "directly or indirectly carrying on or being "interested or concerned in carrying on the business."

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I have read the clause, and the main burden of the attack upon it in the court below by Mr. Lindner for the defendant, Mr. Bradford, was as regards the radius of ten miles. Upon that issue there was before the judge a great deal of evidence. Maps were provided for the court, and for the purposes of reference the most convenient document to which to refer to is a document which I understand was prepared by the defendant and his wife in collaboration, which consists of a series of circles in which are inserted first the centres of various townships or villages within the area comprehended, and, second, figures relating to the number of patients within the various rings delineated. The finding of the judge (and Mr. Lindner complained of this decision) was this: "In 1945 there were a certain number of National "Health Acts patients—what were called 'clubs' and medical "service patients—and also some private patients, some of which "were apparently some way from the centre of Atherstone but "which, according to the evidence which was given before me, "represented a certain amount of the income of the partnership "because they were useful patients to have. Some of those were "quite far out, some distance from Atherstone. There were "surgeries at Hartshill, at a place called Chapel End, which is "between Atherstone and Nuneaton, and there was another "surgery at Baddesley Ensor, which is more or less due west of "Atherstone. The bulk of the practice undoubtedly was south "of the line of Watling Street, and the greater proportion of it "was concentrated within an area of five miles as the crow flies "from Atherstone, with the greater part of that area south of "Watling Street." I had not hitherto stated that the centre of the business and the main premises were in the town of Atherstone in Warwickshire, a town of some 9,000 inhabitants, and that the area which the ten miles comprehended is one which is traversed diagonally by the well-known ancient Roman thoroughfare of Watling Street.

Mr. Lindner says that the passage which I have read does less than justice to what emerged from the evidence, which was to the effect that at the date of the trial at any rate as much as 99 per cent. in number of the patients who resorted to this firm (and there were apparently some 14,000 patients who at one time or another were on the books of the firm) were persons living

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within a five-mile radius. And, moreover (and this I have felt press most strongly on me) if you describe a circle of five miles radius from the centre of Atherstone, you would only cover a number of relatively small townships. Going outside that radius, between five and ten miles there is the very considerable township of Nuneaton, which has now, we are told, some 53,000 inhabitants, and others like Hinckley, Tamworth and Market Bosworth. The evidence seems to show (to take the case of Nuneaton) that persons residing in Nuneaton not only would but do resort to doctors having their principal places of business in that town, and that to exclude a retiring partner from setting up in Nuneaton was no more reasonable or sensible than to exclude him (as it was not sought to exclude him) from Coventry or Birmingham.

On the other hand it is to be remembered that the test of numbers is not the only test. The evidence showed that though numerically those more or less on the periphery of the ten-mile radius were small, they included a number of more affluent persons, farmers and others, who from the point of view of this profession have the double advantage, first, that they were prepared to pay for the attention they received and did not merely take advantage of the present arrangements under the National Health Service, and, secondly, that, being possessed of motor-cars, they were more mobile and were able to come, as they did, to the principal surgery of the firm. We were informed that at the date when this covenant was entered into (which must be the vital date) these small outlying sources of revenue did between them contribute something like one-third of the total partnership income.

I have said that this is not a case of master and servant. It is a case in which the remaining or continuing partners are entitled to have themselves protected against the competition of an outgoing partner. I quite agree that as a general principle if the court concludes that in any respect (for example, in respect of area) a covenant is wider than reasonable for the protection of that which is entitled to protection, it is not a good answer to say: "Well, it is only just a little bit too wide and unreasonable." The case which Mr. Lindner brought to our attention this morning, *Empire Meat Co. v. Patrick*,¹⁵ illustrates that principle in the case of master and servant. It was a case in which the plaintiffs were butchers and the defendant had been their servant, and a restriction was put on him which barred him from various activities

¹⁵ [1939] 2 All E.R. 85, 93.

within an area of five miles from certain premises in the city of Cambridge. Finlay L.J., in delivering the judgment of this court, said: "It is clear on the evidence, and it is found by the judge, that the great bulk of the plaintiffs' business was within a radius of two miles. If it were necessary, we should be prepared to go further, and to say that the great bulk of it was within a one-mile radius, but it is sufficient to say that beyond a two-miles radius the customers appear to be quite negligible in number." That led the court to say that (in a master and servant case) it was unreasonable to restrict the ex-employee from earning his livelihood anywhere in a radius of as much as five miles, because there was no appreciable subject-matter which would entitle them to so much protection. This case is different. It seems to me that in considering whether the radius suggested is too wide properly to protect the continuing partners against the competition of a former partner it is not sufficient merely to point to the fact that a very small percentage in numbers of the patients which the firm had in 1945 were beyond the five-mile and within the ten-mile radius. I think the judge may perhaps, by the language I have read, have laid less emphasis than Mr. Lindner was entitled to require on the very large numerical superiority of the first five miles, so to speak, as against the second. Still there is nothing in it which I think involves any misapprehension of the facts of the case, and on the whole, therefore, I have come to the conclusion that in a case of this kind there is no sufficient ground for saying that we should interfere with the judge when he held that ten miles was a reasonable area to impose on an outgoing partner.

The next point taken was with regard to the length of time of twenty-one years. Twenty-one years, of course, is a long time, and in practice might well be equivalent to a life banishment from the area concerned. But I am not persuaded that in a case of this kind there is anything vicious in so long a period of time. The partnership, as is evidenced by the second clause, was intended to continue for a long period. A man like Dr. Bradford, with his professional qualifications, is a relatively mobile person and the whole of the rest of the United Kingdom is open for the application by him of his professional skill. I am not therefore satisfied that twenty-one years is over long.

I come to consider the effect of the formula which, for better or worse, has been introduced, "directly or indirectly carrying on or being interested or concerned in carrying on the business

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1951 agree with Mr. Lindner that there ought not to be any " common
WHITEHILL " form " in covenants of this kind. It is unfortunate that the
v. tendency appears to persist of using formulæ in covenants of this
BRADFORD. kind perhaps without any very close reflection on what the results
Evershed M.R. may be. But in considering the language in this case it is
 important to my mind to note that we are here dealing with pro-
 fessional men. If we were dealing with the business of butchers
 (to revert for a moment to the illustration of the *Empire Meat*
 Co. case ¹⁶), it is clear from the name that the business or trade
 is one which may be carried on by or through the medium of a
 limited liability company. And if you impose on a covenantor
 a prohibition against directly or indirectly being concerned or
 interested in the particular business which is or is likely to be
 carried on by a limited company, you may be saying that he
 cannot hold a few shares in a trust company which itself holds
 the majority of the shares in another company or concern carrying
 on the trade of butchers. That may very well be fatal to
 the covenant. But nobody has ever suggested (and I cannot
 think that it will in the near future happen) that the business
 of a general medical practitioner can be carried on by a limited
 company. These professional businesses require that professional
 men having certain professional qualifications shall themselves
 carry on the business or profession; and, therefore, in such a
 case as the present this formula cannot have so wide an effect as
 it would have in the example I have taken of butchers. Indeed,
 though the care and ingenuity of the learned counsel in the case
 have given many examples, it has not been easy for either Mr.
 Salt or Mr. Lindner to think of examples to which this formula
 might apply. It may even be that it was put in, in the belief
 that it really meant nothing or added nothing, and, if so, my only
 comment is that it would have been much better left out. Still
 there are perhaps illustrations which are not extravagant to which
 the words might have application. To take one of Mr. Salt's
 examples, if the outgoing partner carried on the business by
 entering into a partnership with another doctor who did all the
 work while he remained what is called a sleeping partner, he
 might very well be said then to be interested or concerned in
 carrying on the business though he did nothing himself actively
 within the area. There is the illustration again of financing
 another to enable that other to carry on the business in the area.,

¹⁶ [1939] 2 All E.R. 85.

or of being an assistant to a doctor carrying on within the area, the nature of his assistance being such as would involve some participation in the conduct of the profession itself. All these cases seem to me to provide some scope for the formula; but no one has suggested any obvious or clear meaning which would involve something which to my mind was altogether unreasonable. These illustrations do not carry the effect of this clause beyond what is reasonably required to protect the continuing partners against competition.

Then a point was debated and it can be stated most easily by reference to an example. Suppose Dr. Bradford set up a business with his name on a plate and established a surgery in the centre of the city of Coventry outside the ten-mile radius, would he then, without infringing his obligation, be entitled to go inside the ten-mile limit and attend to patients there or to attend to patients who came from inside the area to his surgery in Coventry? My own view is that the formula which has been used would prevent the outgoing partner from coming in and acting as a doctor to patients within the area although his name-plate and place of business were outside the area. At any rate I am prepared to assume for this purpose that that is the effect of the clause. Even so, however, I cannot conclude that it goes further than is required to protect the continuing partners against the competition of the former partner. There is plenty left for the outgoing partner outside this ten-mile radius, and I do not think that there is anything unreasonable in this provision. Nor, finally, do I think that if we add all these various points together, the extent of the radius, the length of time, the width and liberality of the language used, we get a result that in its totality produces something unreasonably wide.

There only remains for discussion one point, namely, what is the result of the impact upon this business of the National Health Service Act, 1946? One plain intention of the Act provided by section 35 was that doctors who participated in the scheme of the Act by having lists of patients in accordance with the Act could no longer sell their goodwill. That formerly valuable asset of a doctor's practice became no longer saleable by the doctor in the cases mentioned—and in the case with which we are concerned each of the four partners was a listed doctor. But that prohibition does not, in my judgment, have the effect of destroying the goodwill; still less does it have the effect of vesting it in the State. The goodwill remains one of the assets of the firm, but it is subject

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to the limitation that it cannot be sold to other people. So long as the firm carries on, the goodwill must necessarily remain one of its most valuable assets, for by goodwill in this case is meant, I take it, the tendency of patients whom the doctors have treated to continue to resort to that firm for further treatment. The partners' livelihood, therefore, as doctors depends very substantially on the goodwill they have created and on the extent to which they are able to preserve it. So much indeed seems to be necessarily implicit in the National Health Service (Amendment) Act, 1949. Section 1 (5) provides: "Where any agreement to which this section applies"—that is, a partnership agreement such as the present—"imposes an obligation or confers an option on a listed or new listed partner to purchase the share of another partner being a listed partner in the goodwill of the partnership practice . . . that share"—that is, the share of the partnership including goodwill—"shall be transferred at the time and on the terms (except as to the payment of the purchase price) provided in the agreement"; and then it is provided that the continuing partners do not have to pay, but the outgoing partner becomes entitled at some time (which may or may not have occurred in the present case) to receive compensation. Then I pass to subsection (12): "Where any agreement to which this section applies contains provisions which take effect on the purchase of any share or part of a share of the goodwill of the partnership practice, those provisions shall take effect in like manner on the transfer of that share . . . notwithstanding that the transfer does not constitute a purchase." It seems to me in face of these amending provisions that it is not possible to say that the element of goodwill is so taken away that the ordinary principles which would otherwise have applied in their application to covenants in restraint of trade are no longer effective. I think we must consider this covenant apart from the new legislation, and if we were satisfied that when it was made in 1945 it was a good covenant and one which the court would enforce, then nothing that has happened as the result of the National Health Act, 1946, has altered that result. I think therefore (with the judge) that the matter is not affected in the circumstances by the Act of 1946. Nor do I think that this is a case in which the court ought in any way to limit, or refrain from imposing, any injunction which would otherwise have been granted. I, of course, entirely agree with Mr. Lindner that the court will not grant an injunction that will have no effect, but I am quite satisfied that

if the injunction which Danckwerts J. granted is continued, as I think it should be, it would be quite effective. It may be that questions will arise whether anything which Dr. Bradford does involves any breach of the injunction. One of the examples which I have indicated in the course of my judgment may hereafter have to be decided. For that reason I have not attempted to give by way of anticipation an answer to all those points. I have merely said enough, I hope, to show good grounds for the conclusion which I reach, which is that the judge here arrived at a correct conclusion, and I accordingly think that the appeal fails and should be dismissed.

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BIRKETT L.J. The matters of fact and the questions of law in this appeal have been so fully dealt with in the judgment of the Master of the Rolls that were I to add a judgment of my own it would consist of mere repetition and would serve no useful purpose. I am therefore content to say that I agree fully and completely with the judgment of the Master of the Rolls and do not desire to add anything to it.

UPJOHN J. I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Carleton-Holmes & Co., for A. H. Sale & Hill, Atherstone; Kingsford, Dorman & Co., for Restall, Round & Gloster, Birmingham.*

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[1951 U. 101.]

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Nov. 16, 29;
Dec. 20.

Statute—Rules made thereunder—Rules made between passing of Act and its coming into force—Rules made applicable on day after Act came into force—Validity of rules—Whether “necessary or expedient for the purpose of bringing” the Act “into operation”—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 36 (1), s. 37—Registered Designs Act, 1949 (12, 13 & 14 Geo. 6, c. 88), s. 1 (4), s. 36—The Designs Rules, 1949 (S.I. 1949 No. 2368), r. 26.

 Evershed M.R.,
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The Registered Designs Act, 1949, s. 1 (4), provides: “Rules made by the Board of Trade under this Act may provide for

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“excluding from registration thereunder designs for such articles, “being articles which are primarily literary or artistic in “character, as the Board think fit.”

This Act was passed on December 16, 1949, and on the same day the Designs Rules, 1949, were made to come into force on January 2, 1951, the day after the Act came into force. Rule 26 of these rules excluded wall plaques and other things from registration under the Act.

Held, that the Designs Rules, 1949, were validly made in view of section 37 of the Interpretation Act, 1889, which provided that when an Act passed so as to come into force at a later date conferred the power (*inter alia*) to make rules, “that power may, unless “the contrary intention appears, be exercised at any time after “the passing of the Act so far as may be necessary or expedient “for the purposes of bringing the Act into operation at the date “of the commencement thereof.”

Per Evershed M.R. (expressing a difficulty felt also by Morris L.J.): “I should myself feel difficulty in treating as valid “a rule made by virtue of section 1 (4) of the Act and solely “relating to an exclusion under that subsection” as was rule 26. But “I do not think it would be right to pick out one rule” from a large body of valid rules and treat it as invalid.

Rex v. Minister of Town and Country Planning [1951] 1 K.B. 1 applied.

APPEAL from Sir Leonard Stone, Vice-Chancellor of the County Palatine Court of Lancaster.

The plaintiff was the author and designer of a plaque known as “a garden interior” and claimed to have the copyright of this plaque. He brought proceedings on July 19, 1951, in the County Palatine Court against the defendant, who carried on business in Manchester as the manufacturer of plaques, claiming that he had infringed the plaintiff’s plaque by offering for sale a reproduction or colourable imitation of this plaque.

A summons was then issued by the defendant pursuant to Ord. 32, r. 1, of the rules of that court asking that it might be determined whether, upon the agreed statement of facts set out in the schedule thereto, copyright in the plaque was at the date of the writ incapable of subsisting on the grounds that the plaque was (a) a design capable of registration under the Patents and Designs Act, 1907, and (b) was used or intended to be used as a model and pattern to be multiplied by an industrial process.

The agreed statement of facts was, so far as material, as follows: (1) The plaque was produced and published prior to January 1, 1951. (2) At the date when the plaque came into existence it was intended by the plaintiff that it should be reproduced in more than 50 single articles. (3) The plaque was not.

registered as a design under the Patents and Designs Acts, 1907–1919, because the Comptroller of the Patents Office would not register wall plaques as designs under those Acts.

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Paragraph 4 stated the method of manufacture of such plaques.

Sir Leonard Stone V.-C. said the question was whether the copyright in the plaque was incapable of subsisting on July 19, 1951. The grounds for this incapability arose from the Copyright Act, 1911, s. 22 (1), by which copyright that would otherwise subsist was not to apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs not used or intended to be used as models or patterns to be multiplied by an industrial process.

The Comptroller would not register wall plaques under the Patents and Designs Acts, 1907–1919, but since the design of plaques could have been registered under these Acts, and that was not done, the Copyright Act, 1911, did not apply to a plaque before January 1, 1950. But by the Designs Rules, 1949 (S.I. 1949, No. 2368), made under the Registered Designs Act, 1949, rule 26 excluded wall plaques from registration under the Act.

By virtue of the Interpretation Act, 1889, s. 38 (1), the opening words of the Copyright Act, 1911, s. 22 (1), must be read as “capable of being registered under the Patents Act, 1949, or the Registered Designs Act, 1949, as the Patents and Designs Acts, 1907–1919, had been repealed.” The result was that the copyright of the design of the plaque was not incapable of subsisting under the Copyright Act, 1911. The defendant appealed.

During the argument on November 16, 1951, the Court of Appeal raised the question of the validity of the Designs Rules, 1949, and of rule 26 in particular, having regard to the fact that the rules were made on the day the Registered Designs Act, 1949, was passed under sections 1 (4) and 36 of the Act and came into force a day after the Act did so on January 1, 1951. The court invited the assistance in regard to this of the Attorney-General and adjourned the hearing till November 29, 1951.

The question so raised by the court is alone reported.

Sir Lionel Heald A.-G. and *Stuart Bevan* for the Comptroller-General of Patents as amici curiae. The Designs Rules, 1949, were valid by reason of the Interpretation Act, 1889, s. 37, which enables rules to be made “so far as may be necessary or expedient for the purpose of bringing the Act into operation.” In *Rex*

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v. *Minister of Town and Country Planning*¹ the Court of Appeal said that the words "necessary or expedient" should be given a broad meaning, and it was sufficient that the rules were required for the purpose of making the machinery of the Act work.

[EVERSHED M.R. Does this cover the present case and in particular rule 26?]

It can be said, as in *Rex v. Minister of Town and Country Planning*,¹ that there would have been a vacuum if the rules had only been made after the Act came into force.

[EVERSHED M.R. Section 1 (4) clearly indicated that the Board of Trade might exclude any particular thing from registration after the Act came into force.]

Even though there would have been no vacuum, section 37 of the Act of 1889 would justify rules needed to make the machinery work. It is sufficient that the making of the rules was "expedient."

[EVERSHED M.R. But was the provision against registering wall plaques so important?]

There was nothing sinister or novel about making the rules before the Act came into force. It is what is normally done, as, for example, in the case of the general rules under the Patents and Designs Acts. As regards wall plaques, something obscure was being cleared up, for previously the registrar made a habit of refusing registration of them, although that might not be justified under the earlier Acts.

[JENKINS L.J. These rules were made on the day the Act was passed. Can it be assumed that the rules were made after the Act received the Royal Assent?]

Under section 36 (2) of the Interpretation Act, 1889, an Act expressed to come into operation on a particular day is deemed to come into operation on the expiry of the previous day.

James FitzHugh for the defendant.

P. Ingress Bell for the plaintiff.

Cur. adv. vult.

December 20. Their Lordships read their judgments, which, so far as they related to the point being reported, were as follows:—

EVERSHED M.R. On the matter raised during the argument, on which the Attorney-General was good enough to assist us as *amicus curiae*, namely, that of the validity of rule 26 of the

¹ [1951] 1 K.B. 1.

Designs Rules, 1949 (S.I. 1949, No. 2368), I agree with the conclusion of my brother Jenkins, though I am bound to say that I have felt greater difficulty than he upon it. So far as this particular rule is concerned, it seems to me that the problem is in many respects different from that considered by this court in *Rex v. Minister of Town and Country Planning*.² In that case the effect of the repeals in the Town and Country Planning Act, 1947, would have had the result that all the machinery which had operated under the previous Act would have ceased to be effective unless some step were taken to keep it alive; in other words, upon the coming into operation of the new Act there would have been an administrative vacuum and pending applications would have lost all force and effect. The direction therefore issued by the Minister had the effect of preserving the validity of those applications and of securing that when the new Act came into force it would operate effectively.

I agree, accordingly, on the authority of that case, that the phrase in section 37 of the Interpretation Act, 1889, "so far as " may be necessary or expedient for the purpose of bringing the " Act into operation at the date of the commencement thereof," extends to something more than that which is requisite to enable the Act to come into operation at all; in other words, I think, particularly having regard to the words "or expedient," that the section covers such steps as would be required to enable the Act to operate effectively.

My difficulty in the present case has been caused by the fact that the rule-making power in section 1 (4) of the Registered Designs Act, 1949, clearly contemplates that from time to time, as the Board of Trade may think proper, provision may be made, while the Act is in operation, for excluding from registration certain types of design; and I have not found it easy to persuade myself that in order to enable the Act effectively to operate, it was requisite to exclude from registration a type of design which for many years had apparently been within the ambit of the previous legislation, but which the registrar had in practice not accepted for registration. I should, therefore, for myself have felt difficulty in treating as valid a rule made by virtue of section 1 (4) and solely relating to an exclusion under that subsection. And if such a rule were validated by the language of section 37 of the Act of 1889, it would appear to me difficult to give any sensible effect to the words "for the purpose of bringing the Act into

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² [1951] 1 K.B. 1.

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“operation.” In the present case, however, the rule in question is part of a larger body of rules made under the general powers of section 36 of the Act and clearly justifiable as “expedient,” if not “necessary,” so as to give the new Act a working machinery when it came into operation. And this being so, I do not think it would be right to pick out one rule because, taken in isolation, that rule might be said to fail to satisfy the requirements of section 37 of the Act of 1889. In other words, I have been satisfied on the whole that in its context, as part of a general body of rules providing the machinery for the effective operation of the new Act, this rule can fairly be said to satisfy the conditions of validity.

JENKINS L.J. The question raised in the course of the argument concerning the validity of the Designs Rules, 1949, is obviously a question of great public importance; and the court invited and obtained the assistance of the Attorney-General upon it at an adjourned hearing.

The validity of the rules (made, as they were, between the passing and the coming into operation of the Registered Designs Act, 1949), depends on section 37 of the Interpretation Act, 1889, which is in these terms: “Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any order in council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.” Reference should also be made to section 36 (1) of the same Act, which provides: “In this Act, and in every Act passed either before or after the commencement of this Act, the expression ‘commencement,’ when used with reference to an Act, shall mean the time at which the Act comes into operation.”

The question was in effect whether, on the true construction of section 37, rules such as rule 26 of the Designs Rules, 1949, could be held to be “necessary or expedient for the purpose of

“ bringing ” the Registered Designs Act, 1949, “ into operation ” within the meaning of the section. In my opinion, the answer should be in the affirmative. I think the point is covered in principle by what was said in this court in *Rex v. Minister of Town and Country Planning*,³ where the effect of section 37 was considered in relation to the Town and Country Planning Acts of 1944 and 1947. In that case Tucker L.J. said⁴: “ In my view, “ section 37 applies to the present case. I think that it clearly “ gives power to take the necessary steps to set up the machinery “ for bringing the Act into operation as well as for doing such an “ act as appointing a day for the Act to come into operation. “ The words in section 37 referring to regulations, byelaws, notices, “ prescribed forms, and so forth, make it clear that matters of “ that kind may be made under section 37 so that the necessary “ machinery will function as soon as the new Act comes into “ operation and things shall not come to a standstill by reason of “ the repeal of the existing Act. In the present case there were “ these applications pending under section 1 of the Act of 1944. “ I think that that is just the kind of thing that is contemplated “ by section 37 of the Interpretation Act, 1889, and that, having “ regard to para. 16 of Sch. X to the Act of 1947, the order con- “ tained in the letter of June 16, 1948, was valid, notwithstanding “ that it was made before the appointed day.”

Asquith L.J. said⁵: “ I agree. I think that the only point “ of substance raised by counsel for the applicants in his ingenious “ argument was this: he argued that section 37 of the Interpre- “ tation Act did not apply because the giving of the directions “ contained in the letter of June 16, 1948, was not necessary or “ expedient for the purpose of bringing the Act of 1947 into opera- “ tion. He appeared to submit that nothing could be ‘ necessary “ ‘ or expedient ’ for this purpose except such an act as fixing the “ appointed day itself. I cannot agree that the words should “ receive so restricted an interpretation. It seems to me that “ the preservation of the applications made under the Act of 1944 “ was necessary and expedient for the purpose of giving the Act “ of 1947 material upon which to operate, and that this is enough “ to satisfy the words ‘ for the purpose of bringing the Act into “ ‘ operation.’ ”

The legislation with which that case was concerned was, of course, of an entirely different character from the legislation here

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³ [1951] 1 K.B. 1.⁵ *Ibid.* 8.⁴ *Ibid.* 6.

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in question. Nevertheless, I think it does involve a decision of general application to the effect that section 37 is not confined to the making of rules and so forth, without which the Act in question would be wholly incapable of coming into operation.

Moreover, on consideration of the question *de novo* and apart from the guidance afforded by the case just quoted, it seems to me that section 37, on its true construction in accordance with the natural meaning of the language used, is apt to authorize the making of rules such as those here concerned between the passing and the coming into operation of the relevant Act. As pointed out by Tucker L.J. in the passage cited above, the section extends to a comprehensive enumeration of matters: "order in council, "order, warrant, scheme, letters patent, rules, regulations, or "byelaws." Clearly many of these matters are matters requiring to be dealt with under the Act when in operation, in order that it may operate effectively, rather than matters without which the Act cannot come into operation at all. Further, the vital words of the section are "so far as may be necessary or expedient for "the purpose of bringing the Act into operation at the date of the "commencement thereof." If the section had been confined to matters without which the Act could not come into operation at all, the words "or expedient" would, so far as I can see, have been not only otiose but wholly inappropriate. A matter without which an Act cannot come into operation at all is necessary for the purpose of bringing it into operation, and cannot be anything less than that. A matter which is merely expedient for the purpose of bringing an Act into operation is by definition not necessary for that purpose. It is a matter without which the Act can come into operation, but with which the Act will come into operation more conveniently or effectively.

The view which I have formed is, I think, reinforced by the application to section 37 of the definition of "commencement" contained in section 36 (1). So applied it makes section 37 read: ". . . necessary or expedient for the purpose of bringing the Act "into operation at the date or the time at which the Act comes "into operation," which must I think mean "at the date fixed or "prescribed as the time at which the Act comes into operation." In relation to Acts which themselves fix the date on which they are to come into operation (such as the Registered Designs Act, 1949), as distinct from Acts in which that date is left to be fixed by some rule-making authority, this becomes a wholly idle provision, if the section is regarded as limited to that which is

necessary (in the strict sense) to bring about the coming into operation of the Act, meaning thereby simply the bringing of the Act as such into force. In cases like the present, nothing could be said to be "necessary" or even "expedient" for that limited purpose beyond passively awaiting the arrival of the date fixed by the Act itself. The truth is, I think, that "operation" is used in the section in two different senses, namely, the sense in which it appears in the definition of "commencement" and the sense of "effective operation," and I think that in the phrase "bringing into operation" it is used in the latter sense. On this view section 37 should be construed as extending to whatever is necessary or expedient for the purpose of bringing the Act into effective operation at the date fixed or prescribed as the time at which the Act comes into operation.

It would obviously be in the highest degree inconvenient in the present case if the making of rules under section 1 (4) of the Act of 1949, prescribing the designs to be excluded from registration under the Act, had to await the coming into operation of the Act, as this could inevitably involve a period of confusion and uncertainty, even to the point of bringing the machinery of registration to a standstill. I should add that I am satisfied that the rules must be assumed to have been made after the passing of the Registered Designs Act, 1949, which, as will have been observed, took place on the same day, that is, December 16, 1949. Accordingly, in the view I take the doubt raised as to the validity of the rules is ill-founded.

MORRIS L.J. I have had the advantage of reading and considering the judgment prepared by my brother Jenkins, and I express my concurrence with the conclusions and the reasoning of it.

Until after considering the submissions addressed to us by the Attorney-General I entertained doubt as to the validity of rule 26 of the Designs Rules, 1949. I'am, however, in agreement with the conclusion in regard to this matter expressed by my brother Jenkins, though I have shared and share the difficulties felt by the Master of the Rolls, which he has indicated in his judgment.

Solicitors: *Solicitor, Board of Trade; Charles Russell & Co., for T. H. Hinchcliffe & Son, Manchester; Skelton & Co. Manchester.*

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USHER

v.

BARTOW.

Jenkins L.J.

VAISEY J.

In re HOWELL, DECD.DRURY *v.* FLETCHER AND OTHERS.1952
Jan. 24.

[1951 H. 2146.]

Will—Death duties—Direction that “all legacies and bequests . . . and “all devises be enjoyed free of death duties”—Settled devise—Duties payable on death of tenant for life.

A testatrix directed: “All legacies and bequests both pecuniary “and specific and all devises given by this my will or any codicil “hereto (except the gift of residue) shall be enjoyed free of death “duties.”

She made four settled devises, and gave the residue of her estate, after the payment of her debts and funeral and testamentary expenses and death duties to her nieces in equal shares absolutely.

On the death of the tenant for life of one of the settled devises, the surviving executor took out the present summons to have determined the question whether the direction to discharge death duties applied exclusively to those payable on the death of the testatrix, or whether it extended to the duties payable on the death of life tenants of the settled devises:—

Held, that the courts had shewn a strong tendency to the conclusion that a direction to discharge death duties should be confined to those arising on the death of a testator; and that there was not enough in this will to displace that conclusion. There was no suggestion in the will that anything remained to be done by the executors or trustees after the devises had taken effect and the first trust had come into operation.

In re Laidlaw [1930] 2 Ch. 392 and *In re Shepherd* [1949] Ch. 116 followed.

In re Stoddart [1916] 2 Ch. 444, *Re Parker* (1917) 117 L.T. 422 and *In re Wedgwood* [1921] 1 Ch. 601 considered.

ADJOURNED SUMMONS.

The testatrix, Hannah Maria Howell, a widow, made her will on April 6, 1946. After giving a number of pecuniary and specific legacies, by clause 7 she devised a freehold house to her trustees “upon trust to pay to my niece Ellen Kate Rowland . . . or “permit her to receive the net income derived therefrom during “her life and after her death in trust for her son Henry Fletcher “absolutely.” By clauses 8, 11 and 12 she devised three other freehold houses to her trustees on similar trusts in each case.

By clause 14 the testatrix gave the following direction: “I “direct that all legacies and bequests both pecuniary and specific “and all devises given by this will or any codicil hereto (except “the gift of residue) shall be enjoyed free of death duties.”

By clause 15 she gave the residue of her estate to her trustees "in trust (after paying my debts funeral and testamentary expenses and death duties) for my nieces in equal shares absolutely."

The testatrix executed a codicil to her will on July 18, 1946, the contents of which are not here relevant. She died on July 27, 1946. Her will and codicil were proved at the Ipswich District Registry on December 4, 1946. One of the two executors and trustees died on November 11, 1949.

The tenant for life of one of the settled devises having died on October 26, 1947, the surviving executor of the will took out the present summons to have determined the question whether the direction to discharge death duties contained in clause 14 of the will extended to the duties payable on the death of the tenants for life of the settled devises, or whether it included only duties payable on the death of the testatrix.

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J. H. A. Sparrow for the plaintiff.

Maurice Berkeley for the remaindermen under the settled devises. The testatrix intended the exoneration of duties to include those payable on the death of the tenants for life. She directed not only that legacies and bequests, but also all devises should be enjoyed free of death duties. Great reliance is placed on her use of the word "enjoy": see *In re Stoddart*¹ and *Re Parker*.²

If she intended that all dispositions were to be "enjoyed free of death duties," she must have intended to include future duties. Every member of the court in *In re Wedgwood*³ emphasized the importance of the word "enjoy." [He also referred to the argument in *In re Shepherd*.⁴]

*In re Laidlaw*⁵ depended on the particular direction in that will as regards the residuary estate.

Peter Foster for the residuary legatees. The settled devises are only freed from duties arising on the death of the testatrix. There is a presumption that a direction to pay death duties only extends to the duties payable on the death of the testator or testatrix. To rebut that presumption a clear intention must be found in the will that future duties are to be included: see *In re Shepherd*.⁶

¹ [1916] 2 Ch. 444.

² (1917) 117 L.T. 422.

³ [1921] 1 Ch. 601.

⁴ [1949] Ch. 116, 118.

⁵ [1930] 2 Ch. 392.

⁶ [1949] Ch. 116, 119.

VAISEY J. It was said also in *In re Wedgwood*⁷ that where there is an intention to include the payment of duties arising on the transference to ultimate beneficiaries, clear words must be used expressing that intention.

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VAISEY J. The question has arisen, or will arise, as to all the settled devises, and obviously the same considerations will apply to each one of them. Further duty will be payable on the deaths of the life tenants, and the executor is in doubt whether he ought to make provision for the payment of those future duties, or whether, having discharged the duties immediately payable, he will be in order in distributing the remainder of the estate among the residuary legatees.

This question, which was at one time a familiar one, arose when the Finance Act, 1914, was passed. By section 14 of that Act for the first time prospective duties were chargeable under testamentary dispositions. Up to that time it had always been supposed that death duties payable under a will were payable immediately on the death of the testator. The Finance Act, 1914, was passed on July 31, 1914, and for the first time a second claim for death duty arose. Immediately, this type of question emerged, and engaged the attention of the courts in a long series of cases. Of those cases, I have been referred to those which I recollect as being the material ones. They are five in number, and I will mention them in chronological order. The first is *In re Stoddart*.⁸ In that case Sargant J. had to consider a will which contained this direction: "I direct all the legacies" (whether settled or otherwise) and the annuities hereinbefore "bequeathed to be paid and enjoyed free of all death duties." The real and personal estate was given in that case to the trustees upon trust for sale and conversion and out of the proceeds to pay or provide, among other things, "for the legacies and the duties" thereon and to invest the residue in trust for certain charities." It was held, following the earlier decision of *In re Palmer*,⁹ "that" the words of the will threw prospective claims on the residue "in relief of the settled legacies." The judge called special attention to the reference to the enjoyment of the legacies free of duty as indicating that the testator must have desired that the gift should be, as he said, entirely net, and he pointed out that it would be difficult for the testator in that case to have

⁷ [1921] 1 Ch. 601, 615.

⁹ [1916] 2 Ch. 391.

⁸ [1916] 2 Ch. 444.

used more comprehensive words than those to be found in the will. There the residue was given to charities, and it is not unimportant to observe that the funds being given to permanently established charities, the property would almost certainly have remained in existence, so that recourse could be had to it without difficulty for the purpose of raising or providing for that particular estate duty.

The next relevant case to which reference was made is *Re Parker*.¹⁰ That case is important chiefly because of the observations of Bankes L.J. He said,¹¹ referring to *In re Stoddart*,¹² that what has to be considered is: "The proper construction to be placed upon the language which the testator has used. He used, as it seems to me, expressions which make his intention perfectly clear. I think the intention, if I may borrow the language of Sargant J. in *In re Stoddart*; *Bird v. Grainger*,¹² was this: He clearly intended that the pecuniary legacies settled on his relations should be enjoyed by them absolutely and entirely, and that would have been the effect of the provision for payment of settlement estate duty only it unfortunately happened that there was a change in the law. That particular duty was abolished, and a duty was established which would lead in this particular case, and in many other cases in which wills have been similarly expressed, unless they have been altered to meet the change of circumstances, to difficulties." Having expressed approval of the view stated by Sargant J. in *In re Stoddart*,¹² the judgment of the Court of Appeal in *Re Parker*¹³ followed on the same lines. It was stated in the headnote of that case "that the declaration exempting from duties operated so as to include and make payable out of the testator's residuary estate all legacy, estate and other duties whatsoever thereafter arising by virtue of the limitations contained in the will by way of settlement of each of the four funds, as well as all such duties as became payable on the testator's death." The reasoning of Sargant J. in *In re Stoddart*¹² was preferred by Bankes L.J. to the reasoning of Neville J. in *In re D'Oyly*.¹⁴

*In re Wedgwood*¹⁵ marked an important stage in this long drawn out series of decisions. There it was held by Lord Sterndale M.R. and Warrington L.J., Younger L.J. dissenting, that future legacy duty would be payable out of the ultimate residue

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¹⁰ 117 L.T. 422.¹³ 117 L.T. 422.¹¹ Ibid. 425.¹⁴ [1917] 1 Ch. 556.¹² [1916] 2 Ch. 444, 449.¹⁵ [1921] 1 Ch. 601.

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of the testatrix's estate, but that the estate duty "would be payable out of the corpus of the settled legacy." Lord Sterndale pointed out¹⁶: "Future duties not chargeable by reason of the death of the testator may be charged upon the residue to the exoneration of particular settled legacies. Whether they are so charged or not depends upon the construction of each particular will, and on the construction of this will, in my opinion, they are not so charged." Warrington L.J. said¹⁷: "Neither *In re Stoddart*¹⁸ nor *Re Parker*¹⁹ is, in my opinion, in conflict with this view. In the former the words were 'paid and enjoyed,' this last word pointing to duties affecting the beneficial enjoyment of the legacy, whether in force at the date of payment to the legatees or not. In the latter the words were 'shall be free of legacy duty, succession duty, settlement estate duty and all other death duties.' Now in that case the will was after the Finance Act, 1914, and, if the direction did not include the estate duty payable by reason of the provisions of that Act, there would be no 'other estate duty' in respect of a settled legacy except the legacy duty already specially mentioned. Moreover, there was no reference to 'payment' sufficient to suggest the time of payment as that at which the class of duties referred to was to be ascertained."

Eve J., in *In re Laidlaw*,²⁰ came to the conclusion that the direction did not extend to future duties, but was confined to duties payable on the testator's death. That depended on a rather curious circumstance in that case. The words of the direction there were that all legacies and annuities should be "satisfied, paid and enjoyed free of death duties." There was a direction which contained certain provisions depending on the amount of the testator's residuary estate undisposed of at the time of his death. The judge found, as appears from the headnote, that that was an indication in the will "that the testator must have intended and contemplated that the value of his residuary estate would be exactly ascertained within a reasonable time, probably a year after his death, the direction as regards estate duty applied only to such duty as would become payable on the death of the testator himself and not to any duty which might accrue due in the future by reason of dispositions of the will." On that ground the judge came to the

¹⁶ [1921] 1 Ch. 601, 615.¹⁷ *Ibid.* 620.¹⁸ [1916] 2 Ch. 444.¹⁹ 117 L.T. 422.²⁰ [1930] 2 Ch 392

opposite conclusion with regard to legacy duty; that is, he applied *In re Wedgwood*²¹ and distinguished *In re Stoddart*.²²

Those cases all arose after the passing of the Finance Act, 1914, when there were a large number of wills coming into operation which had been drafted before that Act was passed or even contemplated. But the point is one which continually arises, and it came before Harman J. in *In re Shepherd*.²³ In that case there was a direction that "all the before mentioned legacies and specific and pecuniary bequests (whether settled or otherwise) and all the said annuities whensoever payable shall be paid free of all legacy and other death duties (if any) and that all such duties shall be paid out of my residuary estate." There was also a direction that the testator's trustees should make provision for the payment of duties on any legacies bequeathed free of duty. Harman J. held that "there is a presumption that a testator only intends to provide for the payment of the duties arising on his own death and to rebut it a clear intention to provide for the payment of future duties must be found." The judgment of Eve J. in *In re Laidlaw*²⁴ was cited in support of that proposition. I am not quite sure that I should have put it as strongly as Harman J. did as to the existence of a presumption; but I think that it would be perfectly accurate to say that there is a strong tendency against coming to such a conclusion, based partly upon the argument of ab inconvenienti. It is awkward that distribution of the residue should be held up for a number of years. Normally, when the thought of death duties crosses the mind of a testator, he is thinking of the imposition which will fall on his death at the time of his death. While I should not have put it as a matter of presumption, but as a matter of strong inclination and tendency, there is not in this case enough to justify me departing from the conclusion reached by Harman J. in *In re Shepherd*.²⁵ In that case the testator intended the exoneration from duties to be confined to those arising on his own death. Harman J. treated it as a matter of construction and he found that on the death of the life tenant, the duty was to be paid out of the capital of the legacy and not out of the residuary estate of the testator. No question of legacy duty arises in this case, but, however that may be, as to the future estate duty, I think that this is a case where I am bound to follow *In re Laidlaw*²⁶ and *In re Shepherd*.²⁵ This is

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²¹ [1921] 1 Ch. 601.²⁴ [1930] 2 Ch. 392.²² [1916] 2 Ch. 444.²⁵ [1949] Ch. 116.²³ [1949] Ch. 116.²⁶ [1930] 2 Ch. 392.

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pre-eminently the type of case in which there is a strong lead in the direction of the conclusion reached in *In re Laidlaw* ²⁶ as against that reached in *In re Stoddart*.²⁷ Indeed, I think that there has been only one of these cases in which the wider construction has been adopted since the decision of *In re Wedgwood*.²⁸

It must now be understood that if testators desire to provide that their estates shall be held up to meet these future duty claims, they ought to say so in unmistakable terms. I do not find any such unmistakable terms in the present will.

The will provides that all the devises given by the will (except the gift of residue) "shall be enjoyed free of death duties." Up to that point either view is possible, but it seems to me to be governed by the words used by the testatrix in the disposition of her residuary estate. She directed that the duties were to be paid as she had provided, and then said that what remained was to be held in trust for her nieces in equal shares absolutely. There was no suggestion that anything remained to be done by the executors or trustees after the devises had taken effect, and the first trust had come into operation. In so far as the surviving trustee was obliged to assent, I think he has done so and, thus, his duties as trustee have come to an end. By reason largely of the absence of any suggestion that provision for future claims has to be made, I decide, in the present case, that the direction that the gifts shall be enjoyed free of death duties applies to the death duties payable on the death of the testatrix, and not to any death duties payable on the deaths of the respective life tenants.

Declaration accordingly.

Solicitors: *Winter & Co., for Drury & Powis, Clacton-on-Sea.*

I. G. R. M.

²⁶ [1930] 2 Ch. 392.

²⁸ [1921] 1 Ch. 601.

²⁷ [1916] 2 Ch. 444.

In re WYNN, DEC'D.
PUBLIC TRUSTEE v. NEWBOROUGH.

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[1951 W. 1253.]

Will—Declaration that trustees are authorised to determine whether moneys are to be considered as capital or income and to determine all questions of doubt—Declaration that such determination shall be conclusive and binding on beneficiaries—Repugnancy—Jurisdiction of court—Validity of declarations.

A testator, whose estate included substantial freehold property, by his will constituted a number of interests in trust as to income and capital. By cl. 30 of his will he provided: "I authorize and empower my trustees to determine what articles pass under any specific bequest contained in this my will . . . and whether any moneys are to be considered as capital or income and how valuations are to be made and/or value determined for any purpose in connexion with the trusts and provisions of this my will . . . and to apportion blended trust funds and to determine all questions and matters of doubt arising in the execution of the trusts of this my will . . . and I declare that every such determination whether made upon a question actually raised or only implied in the acts or proceedings of . . . my trustees shall be conclusive and binding upon all persons interested under this my will . . ."

During 1941–1948 the Public Trustee, the sole trustee under the will, sold for a substantial sum a number of trees standing in the park of a mansion house which formed part of the trust estate. For certain reasons he treated the proceeds of sale as capital. Later he entertained doubts as to the correctness of his action, and took out a summons for the decision of the question whether the proceeds of sale should be apportioned between capital and income, and if so, in what proportions.

It was contended for beneficiaries interested in capital that the Public Trustee had already made a conclusive and binding determination of the matter within the powers conferred by cl. 30 of the will. It was contended for the beneficiaries interested in income that the clause was void, as being repugnant to the terms of the will under which gifts were given to the beneficiaries, and as being contrary to public policy in that it purported to oust the jurisdiction of the court.

Held, that the clause in that it referred the determination of all questions and matters of doubt arising in the execution of the trusts to the trustees and attempted to make such determination conclusive and binding on all persons interested under the will, was void and of no effect, as being repugnant to the benefits conferred by the will upon the beneficiaries, and as being an attempt to oust the jurisdiction of the court to construe a testator's will and to control the administration of his estate.

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In re Raven [1915] 1 Ch. 673 followed; *Philips v. Bury* (1695) Skinn. 447, and *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 K.B. 478 considered and applied.

Per curiam: The insertion of a clause of this kind in a will was not desirable, as it was likely to mislead trustees and beneficiaries as to their true position and rights.

ADJOURNED SUMMONS.

The Honourable Frederick George Wynn, who died in 1932, by his will made in 1931, devised certain substantial freehold estates and mansion houses upon trusts in favour of a number of beneficiaries, some of whom at the material time were interested as to capital and others as to income. The Public Trustee, who was the sole executor and trustee of the estate, took out a summons to obtain the directions of the court as to the disposal, as between beneficiaries interested in capital or income, of the proceeds of sale of certain trees which had stood in the park of one of the mansion houses comprised in the trust estate.

Clause 30 of the will provided: "I authorize and empower my executors until they shall have assented to the bequests contained in this my will or in any codicil hereto and thereafter I authorize and empower my trustees to determine what articles pass under any specific bequest contained in this my will or any codicil hereto and whether any moneys are to be considered as capital or income and how valuations are to be made and/or value determined for any purpose in connexion with the trusts and provisions of this my will or any codicil hereto and to apportion blended trust funds and to determine all questions and matters of doubt arising in the execution of the trusts of this my will or any codicil hereto and I declare that every such determination whether made upon a question actually raised or only implied in the acts or proceedings of my executors or trustees shall be conclusive and binding upon all persons interested under this my will or any codicil hereto."

An affidavit filed on behalf of the Public Trustee stated: "Between the years 1941 and 1948, while the recent war was in progress or during the period of acute shortage which followed it, the Public Trustee sold a considerable quantity of timber and trees from the park at Glynllivon. The net proceeds coming to the hands of the Public Trustee amounted to £7,050 or thereabouts. None, or virtually none, of this wood would have been sold but for the pressure of war or post-war conditions and, although no compulsory powers were actually put into operation, the Public Trustee feels no doubt that such powers

" would have been exercised if he had shown any unwillingness
 " to sell. Glynllivon is not a timber estate and, though trees are
 " sold when ripe, they are not cultivated for that purpose. In
 " the circumstances aforesaid, and as all the trees sold were
 " within the demesne occupied with the house, the trees and
 " timber were then treated as 'amenity trees' and the whole
 " proceeds were treated as capital. There can be no doubt how-
 " ever that some of the trees sold were so far from the house
 " that their felling cannot be said to have affected its amenities
 " and the Public Trustee feels some doubt as to the correctness of
 " his decision and desires to submit the matter for the decision of
 " this honourable court. If a decision is given as to the principles
 " on which the Public Trustee ought to act he feels reasonably
 " confident that there will be no difficulty in working out its
 " application to the facts of the case."

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J. A. Wolfe for the Public Trustee.

M. J. Albery for a defendant interested in capital. It is contended that the Public Trustee has already made a binding determination within the meaning of clause 30 of the will, and that the question cannot be reopened before the court.

If it is suggested that the clause is void on any ground, regard should be had to the long-established practice of conveyancers over very many years in including clauses of this type in wills. Clauses of this type are to be found in all the standard collections of precedents: see *Key & Elphinstone's Precedents in Conveyancing*, 14th ed., vol. 2, p. 643; *Prideaux's Precedents in Conveyancing*, 23rd ed., vol. 3, p. 767, and *Davidson's Concise Precedents in Conveyancing*, 21st ed., vol. 2, p. 572. There is a similar clause in Form 8 of the Statutory Will Forms of 1925, at para. 7 (c).

[DANCKWERTS J. That paragraph appears merely to exclude such matters as the rules in *Howe v. Lord Dartmouth*¹ and *Allhusen v. Whittell*.²]

A similar power is given to trustees by section 15 of the Trustee Act, 1925. In *In re Raven*³ it was held that a clause, which empowered trustees to decide as to the identity of beneficiaries in cases of doubt, was bad; but the power there given was far wider than that conferred on the trustees in the present case. Here all that the trustees may do is to decide matters

¹ (1802) 7 Ves. 137.

² (1867) L.R. 4 Eq. 295.

³ [1915] 1 Ch. 673.

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which concern the quantum of gifts as between beneficiaries, and to settle matters of administration.

A testator has the right to give what rights he wishes to beneficiaries, and to give a discretion to his trustees to decide matters arising out of the provisions of his will. In *In re Fenwick* ⁴ a clause of this type was considered by the court, and no suggestion was made that it was void.

Sir Lynn Ungood-Thomas K.C. and *Lionel Edwards* for a defendant interested in income. *In re Fenwick* ⁴ cannot be relied on as an authority in favour of such a clause, as the question of validity was never raised. Here the Public Trustee, purporting to act under clause 30, has made an attempt to apply some principle of law to the proceeds of sale, and he is now asking the court to decide whether he has applied the principle properly.

In re Raven ⁵ shows that a clause such as this is bad, both because it sets up a power the exercise of which is inconsistent with the rights of the beneficiaries given in the will, and because it seeks to oust the jurisdiction of the court.

A testator by his will effects a transfer of property, and he must effect that transfer by the terms of his will. He cannot hand over to another the power to give the property, or set up a jurisdiction to decide later whether the property is given or not. Only the court can decide that.

Raymond Jennings K.C. and *Hubert Rose* for a further defendant interested in income. It is submitted that *In re Raven* ⁵ is conclusive as to the invalidity of the clause. Although the clause which was held bad in that case was of a narrow, though extreme type, Warrington J. followed and approved the Irish case of *Massy v. Rogers*,⁷ where the clause under consideration was much wider.

This clause is bad, in the same way as an arbitration clause is bad, if it purports to preclude the arbitrator from stating a case for the opinion of the court: see *Czarnikow v. Roth, Schmidt & Co.*⁸ In this case, as in that, questions both of law and of fact were referred to arbitration.

If this clause is good, then there is a complete ouster of the jurisdiction of the court; whereas under the law applicable to arbitrations there is only a temporary stay of jurisdiction, until some proper condition precedent has been satisfied.

⁴ [1936] Ch. 720.

⁵ [1915] 1 Ch. 673.

⁷ (1883) 11 L.R. Ir. 409.

⁸ [1922] 2 K.B. 478.

DANCKWERTS J. [after stating the facts]:—It is contended by Mr. Albery on behalf of those who are interested in capital that the matter has been concluded by the decision of the Public Trustee and that, therefore, there is no room for further argument at the present time by reason of the terms of clause 30 of the will.

The Public Trustee has referred the matter of principle to the decision of the court; but if he has already at an earlier date attempted to decide the matter himself in pursuance of clause 30, and if that clause is effective and binding on all the beneficiaries interested under the will, it seems to me that it is not open to him to go back on his decision and leave the matter now to be decided by the court; and that is particularly so, it would seem, in the present case because the clause provides at the end "that every such determination whether made upon a question actually raised or only implied in the acts or proceedings of my executors or trustees shall be conclusive." Therefore, no formal decision, consciously taken as a decision, would appear to be a necessary factor for the matter to have been disposed of finally by the Public Trustee. If, therefore, this clause is binding on all the parties, it appears to me that the matter has already been decided by the action of the Public Trustee.

An attack, however, is made on behalf of those who have interests in regard to income on the validity of a clause of this kind; and it is said that the clause is wholly invalid by reason either of repugnancy to the terms of the will where gifts are made to beneficiaries by the will; or that it is contrary to public policy as an attempt to oust the jurisdiction of the court. Mr. Albery, on the other hand, seeks to uphold the validity of a clause of this kind, and this clause in particular. He referred me to *In re Fenwick*,⁹ where there was a clause not dissimilar to the present clause. No suggestion was made that the clause was invalid and ineffective; and the judge, on a matter of construction, decided that the clause did not apply in that particular case because there was no question of doubt. Only matters of doubt were referred to the trustees' decision by the clause.

Mr. Albery also pointed out that clauses of this type have appeared for many years in all the well-known books of conveyancing precedents. He referred me to Key & Elphinstone's Precedents, 14th ed., vol. 2, at p. 643; Prideaux's Precedents, 23rd ed., vol. 3, at p. 767, and Davidson's Concise Precedents, 21st ed., vol. 2, at p. 572. It was also suggested that a clause

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⁹ [1936] Ch. 720.

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on the same lines was to be found in Form 8 of the Statutory Will Forms of 1925, para. 7 (c); but, on reference to that clause, it seems to me that the provision in question does no more than exclude in a will which incorporates the statutory will form the rules in *Howe v. Lord Dartmouth*¹⁰ and *Allhusen v. Whittell*¹¹; and it is, of course, well established that a testator may vary the rights of the beneficiaries taking under his will by excluding the rules provided in those cases which settle the incidence of costs and expenses and other matters between beneficiaries.

It also may be said that beneficiaries under a will take what they take purely by the bounty of the testator, and it might be said that, as they are not entitled to anything of right apart from the provisions of the will, they must take their benefits subject to the conditions which are contained in the will and abide by them. Therefore, it may be asked, if that is so, why cannot the testator impose on the beneficiaries under his will conditions which require them to abide by the decision of the trustees as to various matters?

One's mind naturally turns to provisions which are often found in contracts providing for the decision of disputes by an arbitrator, the common arbitration clause. After considerable doubt, the position of an arbitration clause appears to have been settled by *Scott v. Avery*¹² as being valid, provided that it merely requires as a condition precedent to the bringing of legal proceedings upon the contract that there shall have been an arbitration fixing the amounts to which the parties are entitled; and, on the other hand, that anything which goes beyond that, and attempts to deprive the parties of their right to bring an action is unlawful as an attempt to oust the jurisdiction of the court.

The matter is not entirely devoid of authority, though there are not many authorities upon the question. It appears, for instance, that not all disputes could be referred lawfully to the decision of an arbitrator, and that, in particular, in regard to real property the courts were very unwilling to allow their jurisdiction to be lessened or impinged on by the decisions of some outside tribunal; and as long ago as 1695, in *Philips v. Bury*,¹³ there is a statement to the effect that the decision of the construction of a will cannot be referred to arbitration.

The case concerned the rights of rectors to St. Michael's Rectory within the city of Oxford; and Eyre J. said: "He did not doubt, but that an action upon the case lay against the

¹⁰ 7 Ves. 137.

¹¹ L.R. 4 Eq. 295.

¹² (1856) 5 H.L.C. 811.

¹³ (1695) Skinn. 447, 469.

“ visitor in this case, as well as against a bishop, who will not
 “ assail the party, or against an archdeacon, etc., and he said,
 “ thirdly, that a man cannot erect a jurisdiction, which shall not
 “ be examined, no more than he can appoint by his will, that if
 “ any difference arise, that this shall be determined by J. S. and
 “ his determination shall be final.” As long ago as that there
 was a statement which, on its face, seems to me to be contrary
 to the provisions of the kind which are to be found in clause 30
 of this will.

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In *In re Raven*¹⁴ there was a decision of Warrington J. on a clause of a will which provided that “ if any doubt shall arise in
 “ any case to the identity of the institution intended to benefit
 “ the question shall be decided by my trustees whose decision
 “ shall be final and binding on all parties.” It was claimed that
 the institution entitled to claim a legacy of £1,000 given to the
 “ National Association for the Prevention of Consumption ” should
 be decided by the trustees and should not be referred to the
 decision of the court. It was held in that case that “ the direc-
 “ tion in the will so far as it purported to oust the jurisdiction
 “ of the court was void and inoperative (1) on the ground of
 “ repugnancy, and (2) as being contrary to public policy.”

That case, of course, might be said to be rather exceptional,
 and one which might not apply to more ordinary circumstances,
 because the identity of the actual beneficiary was to be referred,
 according to the will, to the decision of the trustee; but Warring-
 ton J. approved and followed the Irish case of *Massy v. Rogers*,¹⁵
 which goes very much further and deals with a much wider clause
 than the case which he had to decide. He approved the Irish
 decision and applied it to the case which he had to decide. It
 seems to me that that case is authority for the proposition that
 a testator cannot compel the beneficiaries taking under his will
 to have their rights decided by the decision of the trustees.

The principles on which the law proceeds are, in my view,
 explained by the Court of Appeal also in *Czarnikow v. Roth*,
*Schmidt & Co.*¹⁶ In that case, where there was a provision for
 arbitration contained in a contract, there was a term which pro-
 vided that “ neither buyer, seller, trustee in bankruptcy, nor any
 “ other person as aforesaid shall require, nor shall they apply to
 “ the court to require, any arbitrators to state in the form of a
 “ special case for the opinion of the court any question of law

¹⁴ [1915] 1 Ch. 673.

¹⁶ [1922] 2 K.B. 478.

¹⁵ 11 L.R. Ir. 409.

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" arising in the reference, but such question of law shall be
" determined in the arbitration in manner herein directed."

Scrutton L.J. said ¹⁷: " I think it is necessary to add a word
" about the effect of *Scott v. Avery*.¹⁸ I have always understood
" it to be a decision that while parties cannot agree to oust the
" jurisdiction of the King's courts, they can agree that no action
" shall be brought in those courts till the amount of liability has
" been settled by arbitration. Alderson B.¹⁹ states this as agreed
" by all parties, and Lord Cranworth²⁰ begins his judgment in
" the same way. I do not think the language of Lord Dunedin
" in commencing his judgment in *Atlantic Shipping Co. v. Drey-*
" *fus*²¹ can have been meant to impugn the first part of this
" proposition. The courts always decline to recognize an agree-
" ment to refer all disputes to arbitration as compelling them to
" stay an action, and do so because such an agreement would oust
" the jurisdiction of the King's courts. I prefer the language of
" Lord Sumner, concurred in by Lords Buckmaster and Atkinson,
" to the effect that as long as a clause does not exclude the
" claimant from such recourse to the courts as is always open by
" virtue of the provisions of the Arbitration Act, 1889, but only
" requires certain conditions as precedent to a valid claim, it does
" not oust the jurisdiction. I think that Lord Sumner would
" have regarded a clause depriving a claimant of the protection
" of the Arbitration Act as an ousting of the jurisdiction and
" unenforceable. And I can conceive some conditions precedent
" to enforcing a claim which English courts would decline to
" enforce."

That shows the limitations which are to be imposed even on
an arbitration clause in a contract, and it seems to me that as
regards the construction and administration of a will the policy
of the law is still more severe. I consider that I am bound to
hold, on the authority of *In re Raven*,²² that a provision which,
refers the determination of all questions and matters of doubt
arising in the execution of the trusts of a will to the trustees,
and which attempts to make such determination conclusive and
binding upon all persons interested under the will, is void and of
no effect; because it is both repugnant to the benefits which are
conferred by the will upon the beneficiaries; and also because
it is contrary to public policy as being an attempt to oust the

¹⁷ [1922] 2 K.B. 478, 489.

¹⁸ 5 H.L.C. 811.

¹⁹ Ibid. 844.

²⁰ Ibid. 846.

²¹ (1922) 38 T.L.R. 534.

²² [1915] 1 Ch. 673.

jurisdiction of the court to construe and control the construction and administration of a testator's will and estate.

No doubt it may be said that it is convenient to have matters regarding the apportionment of capital moneys and the application of moneys in the payment of expenses referred to some informal decision, and that in that way expense may be saved which would be necessarily incurred if the matters had to be referred to the court; but in my view a clause of this kind has no effect if it is attempted to use it so as to prevent the beneficiaries requiring the matter to be decided by the court. As long as the clause is not contested, it may be that the beneficiaries will be content to have the matters dealt with by the trustees in the course of their operations in the administration of the estate; and it may, of course, be that the trustees have applied their minds and carried out their duties in a perfectly proper manner in the way in which they deal with matters connected with the estate; but it seems to me that the result is that any beneficiary is entitled to go to the court to have his rights considered and, if necessary, upheld; and that a testator may not by the provisions of his will exclude the right of the court to decide the matters, even though the trustees have considered them and reached a certain decision.

Therefore, in my view the insertion of a clause of this kind in wills is not desirable, because it is likely to mislead equally trustees and beneficiaries as to their true position and rights; and, therefore, it would be far better if a clause of this kind was omitted from a will. Accordingly, I come to the conclusion that my right to decide this question is not concluded by anything that has been done by the trustee; and the matter will have to be considered by the trustee according to the principles which have been agreed as being the proper principles of law to apply in this case.

[His Lordship then considered the proper form of order to make in the circumstances of the case.]

Order accordingly.

Solicitors: *Whitfield, Byrne & Dean, for Carter, Vincent & Co., Caernarvon; Lewis & Lewis and Gisborne & Co.; Robbins, Olivey & Lake, for Arthur Owen & Co., Pwllheli.*

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[1951 B. 4850.]

Will—Statutory power of advancement—Death of testator before January 1, 1926—Execution after that date of instrument by donee of power appointing part of trust fund to her children—Whether “constituted or created before the commencement of” the Trustee Act, 1925—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 32 (3).

Where a will, which confers a power of appointment, takes effect before January 1, 1926, and that power is exercised by an instrument executed after that date, the trusts set up by the later instrument are, for the purposes of section 32 (3) of the Trustee Act, 1925, “constituted” before the commencement of that Act; and the trustees have no statutory power to make advancements under the provisions of that section.

In re Dickinson’s Settlements [1939] Ch. 27, and *In re De la Bere’s Marriage Settlement Trusts* [1941] Ch. 443 distinguished; *Williams v. Muir* [1943] A.C. 468 considered.

ADJOURNED SUMMONS.

The testator, who died in September, 1925, by the second codicil, dated August, 1925, to his will, left his residue on trusts under which the first defendant became tenant for life with power to appoint the corpus among her children subject to her life interest. The second and third defendants, the infant children of the first defendant, were contingently entitled in default of appointment to the corpus of the trust fund on attaining 21 years, subject to their mother’s life interest. The will contained no power of advancement.

In September, 1951, the first defendant executed a deed of appointment of part of the trust fund to the infant defendants in equal shares as tenants in common.

Section 32 of the Trustee Act, 1925, which authorizes trustees to advance beneficiaries with contingent interests, provides by subsection (3): “This section does not apply to trusts constituted “or created before the commencement of this Act.”

The trustee took out a summons to ascertain whether the deed of appointment enabled him to exercise the statutory power of advancement, as the appointment was made after, though the will became effective before, the date on which the Act came into force.

E. I. Goulding for the trustee.

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T. A. C. Burgess for the defendants. It is conceded that a special power is read back into the settlement, but this is not so for all purposes, *e.g.*, in bankruptcy. It is submitted that the trust in favour of the infants was "constituted or created" by the deed of appointment; this particular trust never existed before the deed of appointment was made.

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The words in question appeared in the Trustee Act, 1893, and it seems that "constituted" referred to interests arising by statute on an intestacy, while "created" referred to interests arising out of a will.

Before 1943, when *Williams v. Muir*¹ was decided, the trend of authority favoured the view that the later and not the earlier instrument was effective to create the trust: see *In re Dickinson's Settlements*,² a case which dealt with the provisions for maintenance of section 31, and *In re De la Bere's Marriage Settlement Trusts*.³

Muir's case¹ was concerned with the Scottish Act relating to perpetuities, and is not directly in point, but Lord Romer made certain observations to the effect that the later trusts must be read back into the original instrument. It is submitted that his observations should be regarded as directed to the wording of the Act then under consideration. If they had been intended to be of general application, Lord Romer would have referred to the cases of *Dickinson*² and *De la Bere*,³ which had been cited in argument. [Reference was also made to *In re Dowie's Will Trust*.⁴]

E. I. Goulding (invited by the court to make contrary submissions). The word "trust" appears to have two meanings: (1) the legal relationship which arises when a person entrusts property to another for the benefit of a beneficiary; in that sense only the donor or settlor can "create" a trust; the trust is "created" once and for all when the property is vested in the trustee; (2) the beneficial interest of a beneficiary.

In section 31 the words "interest" and "trust" both occur in such a way that "interest" must mean the rights of the beneficiary, while "trust" must have the first meaning of the general relationship of trustee and cestui que trust set up by the testator. Subsection (5) of that section, which corresponds to section 32 (3), is so differently worded that *In re Dickinson's*

¹ [1943] A.C. 468.

² [1939] Ch. 27.

³ [1941] Ch. 443.

⁴ [1949] Ch. 547.

VAISEY J. *Settlements*,⁵ though rightly decided, can have no bearing on the present case.

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In section 32 the expression "capital money subject to a "trust" indicates that the word bears the first meaning; this view is reinforced by the use of the word "constituted," so often used in the expression "an imperfectly constituted trust," in cases where the property has not been properly assured to the trustees, and equity will not perfect the gift. If the word "trust" bears its first meaning in this section, it is plain that such a trust can be constituted only by the testator, and not by the donee of a power, and that the defendants' case must fail.

In section 69, which contains language very similar to section 32, "trust" again can have only the first meaning; it cannot be "constituted" later than the date of the testator's death, and can be "created" only by his will.

In section 33 (1) the word bears the second meaning, but that section cannot be read as affecting the construction of section 32.

[VAISEY J. Section 33 can only refer to trusts coming into force after the Act.]

Section 32 (3) has been considered in two cases, *In re Darby, decd.*⁶ and *In re Taylor's Will Trusts*,⁷ but they are not of assistance in the present case, as they merely decide that for the purposes of the subsection the effective date is that of the death of the testator and not that of the execution of his will.

[VAISEY J. I suggest that the subsection does not apply if the trust is either constituted or created before the commencement of the Act. I would further point out that the section is revolutionary and confiscatory, in that it enables half the capital of the trust fund to be given to a person whose interest at the time is only contingent.]

I respectfully agree. It is further submitted that *Muir's* case⁸ is applicable here, and should be followed.

VAISEY J. This summons raises a question which, surprisingly, has not been decided already. The question is whether or not the statutory power of advancement conferred on trustees by section 32 of the Trustee Act, 1925, applies to the trusts created by a deed of appointment executed in 1951 pursuant to a special power of appointment conferred by the testamentary dispositions of a man who died before January 1, 1926. The decision depends on the meaning to be attributed to section 32 (3), which is in

⁵ [1939] Ch. 27.

⁶ (1943) 59 T.L.R. 418.

⁷ (1950) 66 (Pt. 2) T.L.R. 507.

⁸ [1943] A.C. 468.

these words: "This section does not apply to trusts constituted "or created before the commencement of this Act." The "commencement" of the Act is defined in section 71 as being January 1, 1926.

[His Lordship stated the facts and continued:] The same point has arisen under section 31 of the Act, which deals not with advancement but with maintenance. The corresponding subsection (5) of section 31 is in these words: "This section does "not apply where the instrument, if any, under which the "interest arises came into operation before the commencement "of this Act."

The first case to which I have been referred was *In re Dickinson's Settlements*,⁹ where Crossman J. held: "Where a power of "appointment is exercised, the document exercising the power "and not the document creating the power is," for the purposes of section 31 of the Act, "the instrument under which the "appointed interest arises as a new interest is created by the "appointment." There is a great deal which could be said from both points of view. In a sense the origin of the trust, by virtue of which the power of advancement is said to arise, is contained in the instrument exercising the power of appointment and not in the original will of the testator. But I think that a distinction has to be drawn between "trusts constituted" and "trusts "created." In my judgment, in the present case the trust was constituted by the testator's will; that is to say, it originated by reason of the constitution of the original trust as contained in the will.

No doubt it was created in one sense when the power of appointment was exercised, but it must be noted that in section 32 the language differs very materially from the language of section 31. It does not refer to the "instrument under which the "interest arises," but to "trusts constituted or created" before the commencement of the Act.

There are other authorities which may have some bearing on the point. In *In re De La Bere's Marriage Settlement Trusts*¹⁰ it was held that the instrument under which certain property was acquired for the purpose of an after-acquired property clause was an appointment and not the original instrument under which the appointment was created. Simonds J. said¹¹: "Those cases "are examples of a principle which seems to be perfectly clear,

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⁹ [1939] Ch. 27.¹¹ *Ibid.* 448.¹⁰ [1941] Ch. 443.

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 "and a later instrument exercising that power, the interest created
 "by the exercise of the power arises under the later instrument,
 "for, in fact, there never was such an interest until the power
 "was exercised so as to create it." In my judgment, the words
 of section 32 (3) are very different, and accordingly that decision
 throws very little light on the present problem.

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In *Williams v. Muir*¹² the question arose under the statutory provisions of the law of Scotland which regulate what is known in England as the perpetuity rule. There it was held that certain provisions, which were alleged to infringe the statutory prohibition against perpetuities, were constituted within the meaning of the Act by the original trust disposition and settlement conferring the power under which they were in fact created, and, accordingly, certain persons became entitled to the fee of the shares held by them, that being the result, according to Scottish legislation, of an attempt to give a life interest which transgressed the permissible period.

It seems to me that that case throws a good deal of light on the problem which I have to decide, though no doubt the cases on the subject of perpetuity stand on a somewhat different footing from cases, such as the present, which depend on the particular meaning of the Trustee Act.

The decision in *In re Dowie's Will Trust*¹³ does not help me much, but it certainly contains nothing which is contrary to the principles and views which I hold to be applicable in the present case.

There are two decisions which deal with the question whether the relevant date under section 32 (3) is the death of the testator, or the date at which the testamentary instrument is executed. But they seem to me to have very little to do with the present problem because I have always understood that, with the exception of such a special case as *In re Illingworth*,¹⁴ it is well settled that a will is ambulatory and inchoate in the lifetime of the testator, and is of no effect until it comes into operation by the death of the testator. The cases I refer to are *In re Darby, decd.*¹⁵ and *In re Taylor's Will Trusts*.¹⁶ Those cases, as I have said, deal with the question whether the relevant date for the purpose of the subsection is the actual date on which the will is signed or the date on which the testator died. It was held in

¹² [1943] A.C. 468.

¹³ [1949] Ch. 547.

¹⁴ [1909] 2 Ch. 297.

¹⁵ 59 T.L.R. 418.

¹⁶ 66 (Pt. 2) T.L.R. 507.

both that the date was not that of the execution of the instrument but the date when the instrument became operative by virtue of the death of the testator.

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It is of importance to notice that section 32 is a revolutionary section, and that it is confiscatory because it enables half of the property held contingently on an infant attaining the age of 21 to be applied for his advancement; that is to say, it gives half of the capital to somebody who, under the terms of the instrument itself, is only entitled to that capital contingently. That is a somewhat revolutionary provision. In my judgment, it may well be that the difference in language between section 31 (5) and section 33 (2), on the one hand, and section 32 (3), on the other hand, is referable to that distinction in importance between the three sections. It would be a very strong thing to hold that this section authorizes, after a trust has been set up under the old law, the confiscation of half the corpus of the property for the benefit of somebody who was merely contingently interested in it; and it seems to me that if the legislature had really meant to apply such a confiscatory provision to interests which arise under a testamentary instrument which came into operation owing to the death of the testator or testatrix before the Trustee Act of 1925 was ever thought of, words of a much stronger character would have been employed.

For those reasons, though with some hesitation, as the point is not easy, I propose to declare that the statutory power of advancement conferred on the trustees by section 32 of the Trustee Act, 1925, does not apply to the trusts set up by the instrument of September 27, 1951.

Declaration accordingly.

Solicitors: *Peacock & Goddard, for Haines & Sumner, Gloucester.*

F. R. D.

UPJOHN J. NEWTON ABBOT CO-OPERATIVE SOCIETY LD. v.
 WILLIAMSON & TREADGOLD LD.

1951
 Nov. 26, 27;
 Dec. 17.

[1951 B. 508.]

Vendor and purchaser—Restrictive covenant—Covenant running with the land—Identification of land in conveyance—Death of vendor—No assent by executors to vesting in beneficiary of benefit of restrictive covenant—Covenant enforceable in equity—Assigns.

In 1923, a vendor, who carried on the business of an ironmonger on premises known as Devonian, of which she was the owner in fee simple, conveyed property opposite to those premises to a purchaser, and the conveyance contained a covenant by the purchaser (who was then carrying on the business of a grocer on part of the premises) not to carry on the business of an ironmonger on those premises.

Devonian subsequently devolved, under the will of the vendor, on her son, and the executors assented in writing to the vesting of Devonian in him, but there was never any assent in writing by them in respect of the benefit of the restrictive covenant.

In 1948, the vendor's son assigned the business of an ironmonger carried on by him at Devonian to a co-operative society, together with the benefit of the restrictive covenant and granted a lease of Devonian to that society for 21 years. In the following year that society became amalgamated with the plaintiff society.

In 1950, the owners and occupiers of the premises conveyed by the conveyance of 1923, who had acquired them in 1947, began to expose for sale on those premises articles of ironmongery and hardware; and in 1951 the plaintiffs began an action against them to enforce the restrictive covenant:—

Held, (1) that there was nothing in the conveyance of 1923, which identified the land for the benefit of which the covenant was alleged to be taken so as to annex the benefit of the covenant to Devonian: *Renals v. Cowlishaw* (1879) 11 Ch.D. 866 followed.

(2) That, although the executors of the will of the vendor had never assigned the benefit of the covenant to her son, that benefit was held by them as bare trustees for him, and he therefore became entitled to the benefit of the covenant in equity and was entitled to assign the benefit in equity on an assignment of Devonian: *Lord Northbourne v. Johnston & Son* [1922] 2 Ch. 309, 317 applied.

(3) That the covenant was not taken solely to protect the goodwill of the vendor's business and was consequently assignable by the vendor.

(4) That, notwithstanding the statement in the judgment of Bennett J. in *In re Union of London & Smith's Bank Ltd.'s Conveyance* [1933] Ch. 611, 625, that, where a person is suing as an assign of the benefit of the covenant there must be something in the deed containing the covenant to define the land for the benefit

of which the covenant was entered into, the court was entitled to look at the attendant circumstances to see if the land to be benefited was shown otherwise with reasonable certainty.

(5) That the plaintiffs were entitled to succeed in the action and to an injunction enabling them to enforce the restrictive covenant.

Dictum of Bennett J. in *In re Union of London & Smith's Bank Ltd.'s Conveyance* [1933] Ch. 611, 625 considered and not followed.

WITNESS ACTION.

By a conveyance of May 9, 1923, Mrs. Bessie Mardon, the owner and occupier of Devonian, Fore Street, Bovey Tracey, on which premises she carried on the business of an ironmonger, conveyed Nos. 25 and 27 Fore Street, together with an adjacent cottage known as "Swiss Cottage," which were opposite to Devonian, to a firm carrying on the business of grocers at No. 27 Fore Street. The conveyance contained the following restrictive covenant: "And the purchasers hereby covenant with the vendor "that they the purchasers and the persons deriving title under "them will not at any time hereafter carry on or cause to be "carried on on any part of the hereditaments and premises here- "inbefore expressed to be hereby conveyed any business of such "a nature which will in any way affect or be in competition with "the business of a furnishing ironmonger china dealer plumber "sanitary or electrical engineer and that furnishing ironmongery "shall mean that the purchasers and those deriving title under "them shall not at any time hereafter sell or expose for sale any "ironmongery or hardware brooms brushes baskets paints lamps "and glasses of any description on any part of the hereditaments "hereby conveyed."

In the events which happened, the defendants, Williamson & Treadgold Ltd., the present occupiers and owners of the freehold of Nos. 25 and 27 Fore Street and Swiss Cottage, acquired the premises in 1947.

Under the will of Mrs. Mardon, who died in 1941, Devonian devolved on her son, Leonard Soper Mardon. The executors assented in writing to the vesting of Devonian in him, but there was no assent in writing in respect of the benefit of the restrictive covenant.

On May 22, 1948, L. S. Mardon, by an agreement in writing, assigned the business to the Bovey Tracey Co-operative Society, together with the benefit of the restrictive covenant. He also granted a lease of Devonian for 21 years to that society. On

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UPJOHN J. April 6, 1949, that society was amalgamated with the plaintiffs.
1951 the Newton Abbot Co-operative Society Ltd.

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After the conveyance to them of the premises in 1947, the defendants continued to carry on the business of grocers, but in 1950 began to expose for sale on their premises articles of ironmongery and hardware.

Ultimately, on April 6, 1951, the plaintiffs began an action against the defendants, alleging that the right to enforce the covenant vested in them, and claiming under para. 1 of their statement of claim: "An injunction to restrain the defendants from carrying on or causing to be carried on the business of a furnishing ironmonger china dealer plumber or sanitary or electrical engineer on any part of the premises known as Nos. 25 and 27 Fore Street and Swiss Cottage Bovey Tracey in the County of Devon and from selling or exposing for sale on any part of the said premises any ironmongery hardware brooms brushes baskets paints lamps or glasses of any description."

The defendants, in their defence, contended that the plaintiffs (whether or not the benefit of the covenant was or purported to be vested in them as alleged in the statement of claim) were not and never had been entitled to enforce the covenant against the defendants.

R. C. C. Binney for the plaintiffs. This is a covenant which runs with the land. It passes with the assignment of Devonian in equity. The plaintiffs are express assignees of the benefit of the covenant and, as such, are entitled to enforce it. [Counsel referred to *Renals v. Cowlishaw*¹ and *In re Union of London and Smith's Bank Ltd.'s Conveyance*.²]

M. Bowles for the defendants. The plaintiffs are not in a position to seek to enforce this covenant. In the first place there never was any assignment of the benefit of the covenant to the vendor's son, as her executors never assented to the vesting of the benefit of the covenant in him. He was, therefore, unable to assign the benefit of the covenant to the plaintiffs' predecessors in title.

This is a personal covenant taken by Mrs. Mardon for the benefit of her business. It was not taken for the benefit of the land. It cannot be enforced against anybody except the person who gave the covenant. In order to enforce a covenant of this kind it is necessary to show that the covenant created something

¹ (1879) 11 Ch.D. 866.

² [1933] Ch. 611, 627.

in the nature of an equitable easement. [Counsel referred to *UPJOHN J. Formby v. Barker*³ and *London County Council v. Allen*.⁴]

The land is not clearly identified in the conveyance of 1923. In order to enforce a covenant of this kind the land must be ascertained from the conveyance containing the covenant. [Counsel also referred to *Ives v. Brown*⁵ and *Lord Northbourne v. Johnston & Son*.⁶]

Binney replied.

Cur. adv. vult.

December 17. UPJOHN J., reading a judgment, stated the facts and continued:—The sole issue before me is whether the plaintiffs are entitled to the benefit of the restrictive covenant, and, if so, whether they are entitled to enforce it against the defendants.

I will deal with the first point first. Mr. Binney on behalf of the plaintiffs submitted first that the benefit of the restrictive covenant was annexed to Devonian so as to pass with the assignment of Devonian in equity without any express mention in that subsequent assignment; in other words, that the covenant runs with the land. Alternatively, he said that the plaintiffs are the express assigns of the benefit of the covenant, and as such are entitled to enforce it. In this difficult branch of the law one thing in my judgment is clear, namely, that in order to annex the benefit of a restrictive covenant to land, so that it runs with the land without express assignment on a subsequent assignment of the land, the land for the benefit of which it is taken must be clearly identified in the conveyance creating the covenant.

That has been established in a number of cases of high authority, and I need only refer shortly to two, namely, *Renals v. Cowlishaw*,⁷ where James L.J. said this: "I am of opinion that the decision of Hall V.-C. is correct. It is impossible, as it seems to me, to distinguish this case from the cases to which he has referred. To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into. Supposing I were now framing the deed afresh, I should not have the remotest idea how the covenant ought to be framed, as I cannot tell what the property was which the parties intended to be protected, and within what limits"; and the second case is also a decision of the Court of Appeal. It is *In re*

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³ [1903] 2 Ch. 539.

⁶ [1922] 2 Ch. 309.

⁴ [1914] 3 K.B. 642.

⁷ 11 Ch.D. 866, 868.

⁵ [1919] 2 Ch. 314.

UPJOHN J. *Union of London and Smith's Bank Ltd.'s Conveyance.*⁸ Romer L.J., delivering the judgment of the court, said this: "Now the defendants are not the original covenantees, and it therefore becomes necessary to ascertain what person other than the original covenantee is entitled to the benefit of a restrictive covenant affecting land. This question was put to himself by *Hall V.-C. in Renals v. Cowlishaw*,⁷ and the answer was given in a judgment so well known that it is unnecessary to refer to it at length. It is a judgment that has received the approval both of this court and of the House of Lords, and has always been regarded as a correct statement of the law upon the subject. Stated shortly it laid down this: that, apart from what are usually referred to as building scheme cases (and this is not a case of that sort), a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land."

Now, looking at the conveyance of 1923, I can find nothing whatever which identifies the land for the benefit of which the covenant is alleged to be taken. Mr. Binney relies on the fact that Mrs. Mardon is described as of Devonian, Fore Street, but that in my judgment is quite insufficient to annex the benefit of the covenant to those premises. There is no other mention whatever of Devonian in the conveyance.

In my judgment, therefore, the plaintiff fails on this point.

I turn then to his second submission, namely, that the plaintiffs are express assigns of the benefit of the restrictive covenant. Mr. Bowles, on behalf of the defendants, contends that, even if it be assumed that his submission (with which I shall deal later) that the covenant was not taken for the benefit of Devonian, but of the business carried on thereat, is wrong, and the covenant was taken by Mrs. Mardon for the benefit of Devonian to enable her to dispose of it to better advantage, yet there is here no complete chain of assignments vesting the benefit in the plaintiffs. He says that there was never any assignment of the benefit of the covenant by the executors of Mrs. Mardon to Leonard Soper Mardon and therefore he was not in a position to assign the benefit of the covenant to the plaintiffs' predecessors

⁷ 11 Ch.D. 866, 868.

⁸ [1933] Ch. 611, 627.

in title. He relied on *Ives v. Brown*⁹ and *Lord Northbourne v. Johnston & Son*.¹⁰ UPJOHN J.

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In my judgment those authorities do not support his contention. The position as I see it was this: On the footing that the restrictive covenant was not annexed to the land so as to run with it, the benefit of the covenant is capable of passing by operation of law as well as by express assignment and formed part of Mrs. Mardon's personal estate on her death: see *Ives v. Brown*.⁹

It was not suggested that there was any implied assent to the assignment of the benefit of the covenant to the residuary legatee, but in my judgment, when her estate was duly wound up and administered, and this case has been argued before me on the footing that that happened many years ago, the benefit of the covenant was held by the executors as bare trustees for the residuary legatee, Leonard Soper Mardon, who was himself one of the executors. He therefore became entitled to the benefit of this restrictive covenant in equity and, in my judgment, he was entitled to assign the benefit in equity on an assignment of Devonian. No doubt had the covenant been assigned to him by the executors, he could also have assigned it at law. That this is the position is, in my judgment, made clear by the following passage in the judgment of Sargant J. in *Lord Northbourne v. Johnston & Son*,¹¹ namely: "Mr. Grant for the defendants put "the first of these defences thus: He admitted that if by the "indenture of July 25, 1884, the trustees had conveyed to Lady "Northbourne not only the unsold portions of the Shipcote Estate, "but also the benefit of the restrictive covenants relating to the "sold portions, she and those entitled under her would have been "in a position to enforce these covenants so far as this defence "is concerned. But he maintained that, when once the trustees "had conveyed the land to Lady Northbourne without the benefit "of the covenants, there was a complete and final severance; "that the covenants remained in the trustees as mere covenants "in gross unconnected with the protection or benefit of land; that "they were incapable of being enforced in equity as against an "assign of the covenantor: see *Formby v. Barker*¹² and *London County Council v. Allen*¹³; and that this defect could not be "cured either by Lady Northbourne or her devisees joining with "the trustees in an action, or by any subsequent assignment of "the covenants by them or their assigns to Lady Northbourne

⁹ [1919] 2 Ch. 314.¹² [1903] 2 Ch. 539.¹⁰ [1922] 2 Ch. 309.¹³ [1914] 3 K.B. 642.¹¹ [1922] 2 Ch. 309, 317.

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“ or her devisees. In my judgment, however, this argument is
 “ unduly technical, neglects the substance of the matter and
 “ is unsustainable. It is of course clear that these restrictive
 “ covenants were entered into for the benefit, not of the trustees,
 “ but of Lady Northbourne, and that they were as much trustees
 “ for her of the benefit of these covenants as of the beneficial
 “ interests in the unsold portions of the estate. If, before the
 “ execution of the conveyance of July 25, 1884, they had capri-
 “ ciously refused to enforce the covenants, she would have been
 “ entitled to compel them to allow her to use their names in
 “ an action for the purpose on proper terms. And she could,
 “ undoubtedly, had the question arisen, have insisted on the
 “ inclusion in the conveyance to her of an express assignment of
 “ the benefit of these covenants. The circumstance that by the
 “ conveyance Lady Northbourne became the legal owner of the
 “ unsold land could not destroy her existing equitable right to
 “ have the restrictive covenants enforced for the protection of
 “ that very land. And a subsequent assignment by the trustees
 “ or their successors in title to Lady Northbourne or her devisees
 “ would merely restore matters to the position in which Lady
 “ Northbourne was throughout entitled to have them placed, and
 “ reunite, as legal rights, those equitable rights that were sub-
 “ sisting together originally. The case differs widely from either
 “ of the two reported cases last referred to, *Formby v. Barker* ¹⁴
 “ and *London County Council v. Allen*,¹⁵ and appears to me to
 “ be completely covered by the reasoning in the judgment of
 “ Hall V.-C. in *Renals v. Cowlshaw* ¹⁶ and in my own recent
 “ decision in *Ives v. Brown*,¹⁷ a case which has many points of
 “ similarity to the present one.”

The second main question was whether the defendants are liable to have the covenant enforced against them. This was Mr. Bowles' main defence in this action and he says that the restrictive covenant was not taken for the benefit of Devonian, and he puts his case in this way: First, he says that in any event this was not taken for the benefit of any land, but was a covenant with Mrs. Mardon personally, solely for the benefit of her business. Secondly, he says that in order that an express assign of the benefit may sue an assignee of the burden of the covenant there must be some reference in the conveyance creating that covenant to the land for the benefit of which it was taken. It will be convenient to deal with the first point first.

¹⁴ [1903] 2 Ch. 539.

¹⁵ [1914] 3 K.B. 642.

¹⁶ 11 Ch.D. 866.

¹⁷ [1919] 2 Ch. 814.

Mr. Bowles strongly urged that the covenant was taken solely to protect the goodwill of the business carried on at Devonian, that it had no reference to the land itself, and that it was not taken for the benefit of that land; in brief, that it was a covenant in gross incapable of assignment. He urged that taking such a covenant would benefit the business in that an enhanced price could be obtained for the business, but no such enhanced price would be obtained for the land. He relied on the fact that the covenant did not mention the vendors' assigns and that it was a covenant against competition. Further, he pointed out that when Leonard Soper Mardon assigned to the Bovey Tracey Co-operative Society, the benefit of the covenant was assigned in the deed which assigned the business and not in the lease of Devonian. If that be the right view, then he said there could be no right to enforce the covenant against the defendants because the mere fact that the defendants took with notice is not sufficient to bind their consciences in equity, and he relied on the two cases of *Formby v. Barker*¹⁸ and *London County Council v. Allen*.¹⁹ Those cases show, he submitted, and I agree with him, that in order to enforce a covenant such as this against an assign of the covenantor, you must show that the covenant created something analogous to an equitable easement, that is, you must find something in the nature of a dominant tenement for the benefit of which the covenant was taken and a servient tenement which was to be subject to that covenant. Here he says there was no dominant tenement; the covenant was taken not for the benefit of any land, but for the benefit of the business.

I do not accept this view of the transaction of 1923. In 1923 Mrs. Mardon was carrying on the business of an ironmonger at Devonian. No doubt the covenant was taken for the benefit of that business and to prevent competition therewith, but I see no reason to think, and there is nothing in the conveyance of 1923 which leads me to believe, that that was the sole object of taking the covenant. Mrs. Mardon may well have had it in mind that she might want ultimately to sell her land and the business and the benefit of the covenant in such manner as to annex the benefit of the covenant to Devonian for, by so doing, she would get an enhanced price for the totality of the assets which she was selling; a purchaser would surely pay more for a property which would enable him to sue in equity assigns of the defendants' premises taking with notice and to pass on that right, if he so desired, to

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¹⁸ [1903] 2 Ch. 539.¹⁹ [1914] 3 K.B. 642.

UPJOHN J. his successors, than for a property which would only enable him to sue the original covenantor, for that is the result of the view urged on me by Mr. Bowles.

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Further, Mrs. Mardon may well have thought that her own business might ultimately be closed down, or the goodwill thereof sold to someone who was going to carry it on on some other premises. She would then be left with Devonian, and Devonian could be sold at an enhanced price to someone intending to carry on the business of an ironmonger, because, if, as part of the sale transaction, he obtained the benefit of the covenant, he could prevent competition from the defendants' premises opposite in that trade.

In my judgment, it was always open to Mrs. Mardon, when she desired to dispose either of the land or the business, to assign the benefit of the covenant with the one or the other or both as she chose. By taking this covenant, she was thereby enabled to sell her premises, or her business, to better advantage as she thought fit. In my judgment, Mrs. Mardon was in the position of the vendor in the example given by Cozens-Hardy M.R. in *Reid v. Bickerstaff*, where he says²⁰: "For example, I sell a piece of land with a covenant that no public-house shall be erected thereon. I sell the adjoining lot to a purchaser who is ignorant of the existence of the covenant. I am at full liberty to release the covenant, or to assign the benefit of it to any particular purchaser, or to deal with the rest of my land as I think fit."

Accordingly, in my judgment, the defendants fail on this point.

Mr. Bowles' second point was that, in order that the benefit of the covenant may be assignable, the land for which the benefit of the covenant is taken must in some way be referred to in the conveyance creating the covenant, and I was naturally pressed with the headnote in *In re Union of London and Smith's Bank Ltd.'s Conveyance*,²¹ which reads as follows: "Where on a sale otherwise than under a building scheme a restrictive covenant is taken, the benefit of which is not on the sale annexed to the land retained by the covenantor so as to run with it, an assign of the covenantor's retained land cannot enforce the covenant against an assign (taking with notice) of the covenantor unless he can show (i) that the covenant was taken for the benefit of ascertainable land of the covenantor capable of being benefited by the covenant, and (ii) that he (the covenantor's assign) is

²⁰ [1909] 2 Ch. 305, 320.

²¹ [1933] Ch. 611.

"an express assign of the benefit of the covenant," and with the following passage in the judgment of Bennett J.²²: "In my judgment, in order that an express assignee of a covenant restricting the user of land may be able to enforce that covenant against the owner of the land burdened with the covenant, he must be able to satisfy the court of two things. The first is that it was a covenant entered into for the benefit or protection of land owned by the covenantee at the date of the covenant. Otherwise it is a covenant in gross, and unenforceable except as between the parties to the covenant: see *Formby v. Barker*.²³ Secondly, the assignee must be able to satisfy the court that the deed containing the covenant defines or contains something to define the property for the benefit of which the covenant was entered into: see James L.J. in *Renals v. Cowlishaw*."²⁴

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With all respect to the statement of the judge, I am unable to agree that where a person is suing as an assign of the benefit of the covenant there must necessarily be something in the deed containing the covenant to define the land for the benefit of which the covenant was entered into. In the first place, the passage in the judgment of James L.J. in *Renals v. Cowlishaw*,²⁴ which I have already read, on which the judge relied, does not in my judgment support the statement of the law for which it was cited. In *Renals v. Cowlishaw*²⁴ there was no express assignment of the benefit of the restrictive covenant (see the statement of fact in the report in the court below)²⁵; and when James L.J. says that to enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into, he is, I think, dealing with the case where it is contended that the benefit of the covenant has been annexed to the land so as to run with the land. When he uses the word "assign" he is using the word as meaning an assign of the land and not an assign of the benefit of the covenant. Secondly, the views expressed by Bennett J. appear to me to be inconsistent with the views expressed in some of the earlier decisions. I do not propose to cite them, but I refer to the following observations on the law on this point, namely, the observations of Collins L.J., delivering the judgment of the Court of Appeal in *Rogers v. Hosegood*²⁶; those of Vaughan Williams L.J. in *Formby v.*

²² [1933] Ch. 611, 625.²³ [1908] 2 Ch. 539.²⁴ 11 Ch.D. 866.²⁵ (1878) 9 Ch.D. 125, 127.²⁶ [1900] 2 Ch. 388, 407.

UPJOHN J. *Barker*²⁷; and to the observations of Cozens-Hardy M.R. in *Reid v. Bickerstaff*²⁸; and to the words of Buckley L.J. in the same case. Finally, in *In re Union of London and Smith's Bank Ltd.'s Conveyance*,²⁹ Romer L.J., reading the judgment of the Court of Appeal, having considered the cases where the benefit of the covenant is annexed to land so as to run without express mention, says: "In all other cases the purchaser will not acquire the benefit of the covenant unless that benefit be expressly assigned to him—or, to use the words of the Vice-Chancellor, 'it must appear that the benefit of the covenant was part of the subject-matter of the purchase.'"

Later in the judgment he says this: "It is plain, however, from these and other cases, and notably that of *Renals v. Cowlishaw*,³⁰ that if the restrictive covenant be taken not merely for some personal purpose or object of the vendor, but for the benefit of some other land of his in the sense that it would enable him to dispose of that land to greater advantage, the covenant, though not annexed to such land so as to run with any part of it, may be enforced against an assignee of the covenantor taking with notice, both by the covenantee and by persons to whom the benefit of such covenant has been assigned, subject however to certain conditions. In the first place, the 'other land' must be land that is capable of being benefited by the covenant—otherwise it would be impossible to infer that the object of the covenant was to enable the vendor to dispose of his land to greater advantage. In the next place, this land must be 'ascertainable' or 'certain,' to use the words of Romer and Scrutton L.JJ. respectively. For, although the court will readily infer the intention to benefit the other land of the vendor where the existence and situation of such land are indicated in the conveyance or have been otherwise shown with reasonable certainty, it is impossible to do so from vague references in the conveyance or in other documents laid before the court as to the existence of other lands of the vendor, the extent and situation of which are undefined."

In my judgment, therefore, the problem which I have to consider is this: First, when Mrs. Mardon took the covenant in 1923, did she retain other lands capable of being benefited by the covenant? The answer is plainly yes. Secondly, was such land "ascertainable" or "certain" in this sense that the existence

²⁷ [1903] 2 Ch. 539, 551.

²⁸ [1909] 2 Ch. 305, 319, 325.

²⁹ [1933] Ch. 611, 628, 631.

³⁰ 9 Ch.D. 125; 11 Ch.D. 866.

and situation of the land must be indicated in the conveyance or otherwise shown with reasonable certainty? UPJOHN J.

Apart from the fact that Mrs. Mardon is described as of Devon, there is nothing in the conveyance of 1923 to define the land for the benefit of which the restrictive covenant was taken, and I do not think that carries one very far; but, for the reasons I have given, I am, in my judgment, entitled to look at the attendant circumstances to see if the land to be benefited is shown "otherwise" with reasonable certainty. That is a question of fact and, on the admitted facts, bearing in mind the close juxtaposition of Devon and the defendants' premises, in my view the only reasonable inference to draw from the circumstances at the time of the conveyance of 1923 was that Mrs. Mardon took the covenant restrictive of the user of the defendants' premises for the benefit of her own business of ironmonger and of her property Devon where at all material times she was carrying on that business, which last-mentioned fact must have been apparent to the purchasers in 1923.

I should perhaps mention that at the date of her death Mrs. Mardon owned other property in Fore Street, but counsel on neither side founded any argument on that circumstance.

It follows, therefore, in my judgment, that Mrs. Mardon could on any subsequent sale of her land Devon, if she so chose, as part of the transaction of sale, assign the benefit of the covenant so as to enable the purchaser from her and his assignees of the land and covenant to enforce it against an owner of the defendants' premises taking with notice, and her legatee, Leonard Soper Mardon, was in no worse position. I do not regard the fact that he assigned the covenant in the deed containing the assignment of the business as affecting the matter. I say nothing as to the position when the plaintiffs' lease expires so that their estate in Devon comes to an end, nor whether Leonard Soper Mardon, having apparently assigned away the entire benefit of the covenant, will then be in any position further to enforce it.

Mr. Bowles took one further point. He submitted that a covenant restrictive of business could not be annexed to land, unless it was a covenant not to carry on a business so as to be a nuisance or annoyance to an adjoining occupier, but he cited no authority for that proposition and, in my judgment, it cannot be maintained: see *Nicoll v. Fenning*.³¹

Accordingly, in my judgment, the plaintiffs are entitled to

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³¹ (1881) 19 Ch.D. 258.

UPJOHN J. succeed in this action and to an injunction as claimed under
1951 para. 1 of the statement of claim.

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Solicitors: *Stileman, Neate & Topping*, for *Herbert Priscott & Co., Newton Abbot*; *H. W. & S. Patey*, for *Hutchings & Hutchings, Torquay*.

J. L. D.

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[1951 P. 1531.]

Will—Two wills—Second will not revoking first will—Second will found by court to be intended to be substituted for first will—Legacies in first will neither revoked nor mentioned in second will—Legacies in first will to stand.

A testatrix made two wills on different dates. Probate of both was granted and therefore it could not be, and was not, held that the second revoked the first. The court, however, found that the testatrix intended the second will to be substituted for the first, save with regard to certain legacies which were given by the first will but were not revoked or even mentioned by the second:—

Held, that those legacies were not revoked.

Tuckey v. Henderson (1863) 33 Beav. 174 considered and applied.

ADJOURNED SUMMONS.

Mrs. Annie Maude Plant (hereinafter called “the testatrix”) made two wills, in 1939 and 1940 respectively. The will of 1939 provided, among other things: “3. I bequeath the following “specific legacies . . . (a) My two silver cups to Francis Brian “Thomas. . . . (b) All my wearing apparel to Mabel Evans. . . . “(c) My apple-green tea-service and china punch bowl to . . . “Alec S. Johnson J.P.” (the plaintiff executor). “(d) All my “jewellery to my cousin Mrs. Ethel Violet Sweet-Escott . . .” (whose name was in fact and was in the will of 1940 given as “Ethel Frances Sweet-Escott”). “4. I devise and bequeath “all the residue of my real and personal estate . . . unto my “trustees upon trust to . . . convert the same into money . . . “and . . . to invest the residue of such moneys in their names “and to stand possessed of such investments . . . (hereinafter “called ‘my residuary estate’): (1) Upon trust to pay the

"income thereof to my husband . . . Robert Shelley Plant for
 "his life and after his death to pay thereout the pecuniary
 "legacies following free of duty: (a) The sum of £10 to William
 "Morgan. . . (b) The sum of £10 to the said Mabel Evans.
 " . . . (c) The sum of £100 to the said Alec S. Johnson J.P. for
 "acting as executor and trustee of this my will. (d) To my
 "cousin the said Mrs. Ethel Violet Sweet-Escott the sum of
 "£200. (e) To my cousin Mrs. Dora Ostrehan the sum of £100.
 "(f) To my cousin Mr. Philip Boole the sum of £200. (g) To
 "my cousin Miss Joyce Thomas the sum of £100. (h) To my
 "cousin Miss Sybil Thomas the sum of £100. (i) To the said
 "Francis Brian Thomas the sum of £200. (j) To the vicar and
 "churchwardens for the time being of the parish of St. John the
 "Baptist in the city of Cardiff the sum of £1,000 to be held on
 "trust by them and their successors to use the income thereof
 "annually for the general purposes for St. John's Church St.
 "John Street Cardiff aforesaid. (2) Upon trust to pay and divide
 "the residue of the capital and income of my residuary estate
 "between the said Alec S. Johnson J.P. and Charles James
 "Hardwicke . . . in equal shares."

The second will provided: "This is the last will and testa-
 "ment of Annie Maude Plant wife of Robert Shelley Plant vicar
 "of Llanwern Mon. I leave to him a life interest in all I possess
 "with the exception of a few legacies to be paid out at my death.
 "I appoint my husband and Mr. Alec S. Johnson J.P. my
 "executors.

"Legacies to be paid at my death. Mrs. Ethel Frances
 "Sweet-Escott £200. Mr. A. S. Johnson £100. Mabel Evans
 "wearing apparel and £10. William Morgan . . . £10. To St.
 "John the Baptist Church £200. My 2 silver trace cups to
 "Francis B. Thomas. My apple green tea service green jug and
 "punch bowl to Mr. A. S. Johnson. . . .

"At my death and my husband's death I wish my money to
 "be divided between my solicitor Mr. Hardwicke and Mr. A. S.
 "Johnson in equal shares."

The testatrix's husband predeceased her. On June 13, 1950,
 the testatrix died. Both wills were admitted to probate. On
 June 5, 1951, the plaintiff, as surviving executor, took out this
 summons, which asked, in effect, (a) whether all or any of the
 pecuniary legacies bequeathed by the will of 1939 were revoked by
 the will of 1940, and (b) whether pecuniary legacies bequeathed
 by the will of 1940 to certain legatees were payable in addition

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to pecuniary legacies bequeathed by the will of 1939 to the same legatees.

R. Gwyn Rees for the plaintiff executor.

C. R. D. Richmond for a residuary legatee. As the legacies given in the will of 1939 to Mrs. Ostrehan, Mr. Boole, the two Misses Thomas and Mr. Francis Brian Thomas are not even mentioned in the will of 1940, the question arises whether they were revoked by the mere making of that will. *Tuckey v. Henderson*¹ makes it clear that they were not, and it is not contended on behalf of this residuary legatee that they are. In that case, as in this, both wills were proved, and Lord Romilly M.R. said²: ". . . if there be legacies given in the first will to objects of bounty not mentioned in the second will, they are not revoked, but, in all other respects, I think the legacies are substitutionary and not cumulative." That case is cited in *Theobald on Wills* (10th ed.), at p. 121, in support of the statement that "If the instrument by which the second gift is made is not a codicil, but is described as a last will and testament, the presumption is strong that it was intended to be in substitution so far as it goes for the prior instrument": see also *Hemming v. Gurrey*.³ In every case the court will look at the whole of each of the two documents to decide whether the second was intended to be cumulative or substitutionary.

In the present case there is substitution save where there is acceleration. In the will of 1939 four legacies are payable on the death of the husband; in that of 1940, on the death of the testatrix, i.e., there is acceleration.

The gift in the will of 1940 of £200 "to St. John the Baptist Church" is in substitution for the gift in the will of 1939 of £1,000 to "the vicar and churchwardens . . . of the parish of St. John the Baptist": *Tuckey v. Henderson*.⁴ Of the £1,000, only the income is intended to be used; but, under the will of 1940, "St. John the Baptist Church" is to have the £200. True, the vicar and churchwardens are to receive the money under the will of 1939, and the will of 1940 does not designate them as recipients. The gift in both wills, however, is undoubtedly intended for the purposes of the church.

G. C. D. S. Dunbar for the pecuniary legatees. The fact that the testatrix did not mention in the will of 1940 five legacies which she gave in that of 1939 shows that she did not intend

¹ (1863) 33 Beav. 174.

² *Ibid.* 176.

³ (1825) 2 Sim. & St. 311.

⁴ 33 Beav. 174.

wholly to substitute the later will for the earlier. The contention that the legacy of £200 "for St. John the Baptist Church" in the will of 1940 is in substitution for that of £1,000 in the will of 1939 is unsound. In that of 1939 it is "to the vicar and "churchwardens"; in that of 1940 to "St. John the Baptist "Church." Whatever the effect may be in practice, on the actual wording "the vicar and churchwardens" constitute one beneficiary or set of beneficiaries, "St. John the Baptist "Church" another. There cannot, therefore, have been substitution, and both legacies ought to stand.

Denys Buckley, for the Attorney-General, adopted the last argument. It is immaterial that in the will of 1940 the testatrix did not state to whom the money was to be paid. In *In re Gare, decd.*⁵ Harman J., after considering the citation in *Cheeseman v. Partridge*⁶ of "the old case of a gift to the Parish "Church of St. Andrew, Holborn," held that a gift to "St. "Peter's Church, Staines," was a valid charitable gift. Thus it is clear that, in the present case, the wording "to St. John the "Baptist Church" is strictly in accordance with the line of authority and would not have been so had the testatrix added to it a direction to whom the money was to be paid.

ROXBURGH J. It seems to me, from the documents, that it was the plain intention of the testatrix to substitute the second document for the first. I realize that I cannot give full effect to that conclusion because both have been admitted to probate, and therefore it is not open to me to say that the second revokes the first in toto. At the same time, I am entitled to look at the two documents and to draw such conclusions as I may from internal evidence, and if the two wills as a whole show that that was the intention of the testatrix, with one exception, to which I will refer, I deem that I have jurisdiction to give effect to that conclusion.

There is an old case, *Tuckey v. Henderson*,⁷ which has stood for nearly 100 years without adverse criticism, and which appears to give full warrant for this course. The two wills in that case were, of course, different from those in this case, and different points may be taken on them; and I am not suggesting that that case decides this case. All I am suggesting is that it warrants the approach which I am making. In that case Sir John Romilly M.R. said⁸: "I am of opinion that the cases of *Hemming v.*

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⁵ Ante, 80.

⁶ (1739) 1 Atk. 436, 437.

⁷ 33 Beav. 174.

⁸ Ibid. 175.

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" *Gurrey* ⁹; *Jackson v. Jackson* ¹⁰; and *Kidd v. North*, ¹¹ govern
" this case, and that, upon the construction of these two wills of
" the testatrix, the second instrument was meant to be in substi-
" tution for the first. It is true that both are wills of the
" testatrix, and that both are admitted to probate, and that it is,
" therefore, simply a question of construction. But as a question
" of construction, I am of opinion that the second is substitu-
" tionary for the first, as regards the legacies in the first will to
" legatees who are also named as legatees in the second. This
" differs from the case of a codicil, a codicil is professedly an
" addition to the will, but this is professedly a substitution for
" it. Though it is called 'the last will,' that does not prevent
" the proof of the prior will, which is not revoked: therefore both
" are proved, and if there be legacies given in the first will to
" objects of bounty not mentioned in the second will, they are
" not revoked, but, in all other respects, I think the legacies are
" substitutionary and not cumulative."

Then he continues ¹²—and this is not unimportant—"There
" is a gift to the rector of Winterbourne, in trust for the aged
" poor women of the parish in the first will, and the same sum
" is given by the second will for the poor generally of the parish,
" as the minister and churchwardens shall think fit; I consider
" that a mere substitution of the one for the other."

Then a little later he said ¹³: "I am of opinion, regarding it
" as a question of construction, as the Lord Chancellor did in the
" case referred to, and considering that, although the testatrix
" calls the second instrument 'my last will,' yet both have been
" admitted to probate, you must look at the general scope of
" both and see if substitution is intended."

That is to be my method of approach to these two wills. I
have them both before me, and this process is not easy to
describe in words; but, looking first at the second will, I see
that it is described as "the last will." I then notice that the
next provision is: "I leave to him"—that is to say, to her
husband—"a life interest in all I possess with the exception of
" a few legacies to be paid out at my death." Pausing there, I
see a noticeable difference between the two wills. The testatrix's
husband was alive at the date of both wills. He did in fact
predecease her, but both were obviously framed on the footing
that he would survive her. The difference, so far, is this: The

⁹ 2 Sim. & St. 311.

¹² 33 Beav. 174, 176.

¹⁰ (1788) 2 Cox 35.

¹³ Ibid. 177.

¹¹ (1846) 2 Phil. 91.

husband had a life interest under the first will and no pecuniary legacies were to be paid until his death. So that here is a noticeable change; the pecuniary legacies are being accelerated.

She used the words "few legacies." I should certainly not be surprised to find, seeing that she was contemplating that her husband would be going short of the income of the money paid out by way of legacies, whereas under the first will he would not have done so, that there was some reduction in the legacies, as it were, in exchange for accelerating payment.

I then read on: "I appoint my husband and Mr. Alec S. Johnson J.P. my executors." She had already done that in her first will, so that can hardly have been intended to be a cumulative provision. Then she mentioned: "Legacies to be paid at my death." As I say, that is a change, and that is what she is emphasizing in the second will.

Then comes a list: "Mrs. Ethel Frances Sweet-Escott 200 pounds." A legacy of that same amount was given to that legatee by the first will. The difference here is only one of acceleration. Then: "Mr. A. S. Johnson 100 pounds." There again the difference is acceleration only. The next, which I regard as highly significant, is: "Mabel Evans wearing apparel and 10 pounds." Mabel Evans under the first will had two separate legacies. The first one was under clause 3 (b): "All my wearing apparel to Mabel Evans." That was, of course, an immediate gift. Under the first will Mabel Evans also had £10, but that was deferred to the death of the testatrix's husband. In the second will it is: "Mabel Evans—wearing apparel and 10 pounds." The wearing apparel could not possibly be duplicated. It had all been given by the first will and so there was no more to give. It therefore becomes necessary to split up the gift in the second will unless the £10 is also substitutionary. Then comes £10 to William Morgan. That again is a mere acceleration. Then comes: "To St. John the Baptist Church 200 pounds." The difference there is more important. Under the first will the gift was to the "Vicar and Churchwardens for the time being of the Parish of St. John The Baptist in the City of Cardiff"—and I stress that it is a church in Wales—"the sum of £1,000 to be held on trust by them and their successors to use the income thereof annually for the general purposes for St. John's Church St. John Street Cardiff afore-said." In the second will it is "To St. John the Baptist Church 200 pounds."

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Counsel for the vicar and churchwardens and counsel for the Attorney-General contended that those were two different legatees and that therefore there was no question of substitution and that these legacies, at any rate, are two separate legacies to two separate entities. That, I think, is the most difficult point in this case. In the first will, the benefit intended by the testatrix is St. John's Church purposes, in the second will likewise, the benefit intended is St. John's Church purposes; in other words, identical. The differences are two: the first will clearly only contemplated the application of the income of an invested fund for those purposes; the second will contemplated an immediate capital payment. That, to my mind, is very natural if I am right in the conclusion, to which I shall ultimately come, that the second will was, with one exception, intended to be in substitution for the first will. The testatrix was accelerating that legacy. She was not prepared to deprive her husband of the income of as much as £1,000 for church purposes, and she may well have thought that it was hardly worth while treating a sum of £200 as a permanent investment.

Then there is this difference, that she has not, in the second will, named the hand to receive the money. In the first will she has. Had she been asked to name the hand in the second will I have no doubt that she would have named the vicar and churchwardens of the church. Mr. Buckley has pressed me with the decision of my brother Harman in *In re Gare*,¹⁴ which, he said, showed that if she had said that, it would not have been in accordance with current practice. I do not know about that; but I think that, whether they would be right or wrong in law, that is the answer which most people would give to the question: into whose hand ought money given to a church to be paid? Therefore, in my judgment, for all practical purposes, the legatee is the same, the legatee being St. John's Church. St. John's Church cannot literally be a legatee because bricks and mortar cannot receive money; but it means for the purposes of St. John's Church.

I now pass to: "My 2 silver trace cups to Francis B. Thomas." He was also given those in the first will. That must be substitution. It could not be cumulative. "My apple green tea service green jug and punch bowl to Mr. A. S. Johnson." That again was also given by the first will. That could not be cumulative; it must be substitutionary. "At my

¹⁴ Ante, 80.

"death and my husband's death I wish my money to be divided
 "between my solicitor Mr. Hardwicke and Mr. A. S. Johnson
 "in equal shares." She mentioned some real estate in her first
 will. She devised all the residue of her real and personal estate
 on trust for sale, and she called it her residuary estate. Then,
 subject to her husband's life interest and to the various legacies,
 she directed her trustees "to pay and divide the residue of the
 "capital and income of my residuary estate between the said
 "Alec S. Johnson J.P. and Charles James Hardwicke in equal
 "shares." Those are, of course, the same residuary legatees.
 In my judgment she meant precisely the same by the disposition
 in the second will as she meant by the disposition "Upon trust
 "to pay and divide the residue," and so on, in the first will.

I have, therefore, come to the conclusion, subject to one
 matter with which I have still to deal, that everything points in
 favour of substitution.

There is this undoubtedly striking fact on which Mr. Buckley
 and other counsel naturally laid great stress: that there were
 five legacies in the first will which were neither revoked nor
 referred to in the second will. There is no doubt, and *Tuckey*
*v. Henderson*¹⁵ shows plainly, that I cannot treat those legacies
 as revoked, and Mr. Richmount, very prudently, anxiously dis-
 claimed any suggestion that they were revoked. I cannot so hold
 because both documents have been admitted to probate. Why
 they were both admitted to probate I shall never know because
 I was informed, no doubt correctly, that the matter did come
 formally before the court but that the judge gave no reasons.

I suspect that the testatrix intended to revoke those other
 legacies for the purpose of reducing the aggregate capital sum of
 legacies, the income from which her husband would lose during
 his lifetime. My suspicions may be wholly ill-founded. The fact
 remains that it is so easy to suggest other reasons for leaving
 those particular legacies alone—she may have forgotten them, or
 have intended to do something different, or she may have wished
 them to stand—that I cannot allow that one circumstance to
 outweigh what seems to me an otherwise wholly consistent trend
 of indication the other way.

Therefore, in my judgment, the broad result is that those five
 legacies and the bequest of jewellery in the first will stand, but
 that nothing else in that will stands except in so far as it gives
 some assistance in construing the second will. For example, I

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¹⁵ 33 Beav. 174.

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might have had some doubt whether "my money" included realty but for the first will. I have no shadow of doubt, looking at the two together, that it does, because what it means, I am sure, is the net proceeds of sale, and she was contemplating that the sale directed by the first will would take place.

Again, the first will may throw some light on who ought to receive the legacy to the church. If Mr. Buckley is prepared, without prejudice, to agree to it being paid to the vicar and churchwardens, I am quite agreeable to that. [Mr. Buckley said that he would raise no objection to its being paid to the vicar and churchwardens. His Lordship then continued:] I will prefix the order with the words "The Attorney-General not objecting" "and without prejudice."

Order accordingly.

Solicitors: *Rhys Roberts & Co., for C. James Hardwicke & Co., Cardiff; William A. Crump & Son, for Gilbert Robertson & Co., Cardiff; Treasury Solicitor.*

K. R. A. H.

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BURGH J.

In re KEELE ESTATES. AVELING v. SNEYD.

[1951 K. 797.]

1951
Nov. 23,
28, 29.

Administration—Will—Settlement—Portions—Jointure—Priorities—Portions and Jointure created under same power by different instruments—Whether ranking pari passu.

The will of a testator, who devised substantial freehold estates in strict settlement, conferred on every tenant for life of the estates, either before or after he became entitled in possession, a power to charge the settled estates with a jointure in favour of his wife, and with the payment of sums as and for portions for his children. At all material times until his death in 1949, the estates were vested in one Ralph Sneyd as tenant for life under the provisions of the will of the testator's brother. In 1949 one Henry Sneyd succeeded as tenant for life under the provisions of the will of the testator, which then became effective.

Henry Sneyd, who then had five daughters by a marriage which had been dissolved, remarried on February 9, 1931. On June 5, 1931, he executed a deed poll by which he appointed that the settled estates should be held upon trust that after his death or with his consent in writing the trustees should raise a sum in trust for his daughters. The deed contained no reference to, or reservation of, his power to create a jointure in favour of his second wife. At a later date, by his will, he charged the estates with a jointure for her.

Henry Sneyd died in 1950, and the infant son of the second marriage became tenant in tail of the estates under the provisions of the will of the testator. The liability for death duties occasioned by the successive deaths of the tenants for life was so heavy that there was a possibility that there might be a deficiency of assets to meet both the portions and the jointure. A summons was taken out to ascertain whether the jointure ranked in priority to the portions, or, if not, what the relative priorities were.

Held, (1) that the proper principle was, that if a person charges property with charges which are to take effect at the same time, and nothing is said about priorities, the charges ought to rank *pari passu*; (2) that there were indications that the jointure was not to have priority over the portions, so that both ought to rank *pari passu*.

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ADJOURNED SUMMONS.

Ralph Sneyd the elder, who died in 1870, devised substantial freehold estates to his brother, the Rev. Walter Sneyd, who died in 1888, for life, with remainder to the eldest son of Walter, Ralph Sneyd the younger, for life, with further remainders which never arose, and with ultimate remainder to Walter, his heirs and assigns for ever. Ralph Sneyd the younger died in 1949.

The will of Walter Sneyd provided that, if he should become entitled in fee simple in possession to the estates his trustees were to hold those estates and his own real estate for a term of 1,500 years to run from his decease, upon trusts under which, in the events which happened, his grandson Henry Sneyd became tenant for life on the death of Ralph the younger. The will conferred upon every person made tenant for life a power to charge the estates with the payment of sums as and for the portions of his or her children, and a power to charge the estates with a jointure in favour of any wife.

In 1931 Henry Sneyd, who had five daughters by a marriage which had been dissolved, married again on February 9, and on June 5 he executed a deed poll (the relevant portions of which are more particularly set out in the judgment) by which he charged the estates with portions for his daughters. At a later date, by his will, he created a jointure for his second wife. He died in 1950, and the infant son of the second marriage became tenant in tail of the settled estates.

On the successive deaths of the tenants for life in 1949 and 1950, heavy liabilities arose in respect of death duties, and there was a possibility that the estate might prove insufficient to meet both the jointure and other portions. A summons was taken out

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for the determination of various questions, including the question whether the portions ranked in priority to the jointure, or, if not, what the priorities were.

Wilfrid Hunt (T. L. Dewhurst with him) for the trustees.

Pascoe Hayward K.C. and I. C. Duthie for the widow of Henry Sneyd. Prima facie, where an instrument confers a power to create a jointure, and a power to create portions, the jointure takes priority over the portions irrespective of the order in which they were created.

Lord St. Leonards, whose view is set out in *Farwell on Powers*, 3rd ed., at p. 577, expressed the opinion that where a jointure and portions are both created by powers, the jointure should prevail over the portions, even though the latter were first charged. [They referred also to *Hall v. Carter*.¹]

E. G. Wright for the portioners. In the deed creating the portions the settlor did not reserve to himself any power to create an overreaching jointure in the future; he put it beyond his power to create afterwards a charge which could even rank *pari passu* with the portions.

The charge for portions is a first charge, and any subsequent charge must rank behind it; otherwise its value would be diminished.

J. A. Wolfe; G. Cross K.C. and W. S. Wigglesworth; Henry Salt K.C. and H. E. Francis, for other beneficiaries, were not concerned to argue on this question.

ROXBURGH J. [after stating the preliminary facts]:—I hope there will not be a deficiency, but, if there is, a very serious question arises as to the position between the widow and the portioners. There are three possible contentions. One is that the widow takes precedence over the portioners. The other is that the portioners take precedence over the widow. The third is that they rank *pari passu*. Naturally enough, counsel on both sides have asked for the maximum, but it may be that I shall favour the middle course.

These powers were not exercised at the same time, and, therefore, not by the same document. The first exercise was by a deed poll of June 5, 1931. The settlor had already remarried on February 9 of that year. The deed which appoints the portions contains the following words: "This appointment is made by the "appointor in exercise of the power for this purpose given to him

¹ (1742) 2 Atk. 354.

“by the will of the testator and of every or any other power enabling him in this behalf (but only if and so far as such powers respectively prove in the events which shall happen to be exercisable by him) and is made subject and without prejudice to his life interest under the said will and to the uses estates and powers preceding or overriding such life estate and to the uses and estates limited or created in exercise of such powers.”

Then he continues: “The appointor hereby irrevocably charges the Keele Estates with the payment of the principal sums and interest and other money to be raised under the trusts of the term hereinafter limited.” That charge makes no reference to the power of jointure so far unexercised, and as he had by then remarried he may have had a future jointure in contemplation. It is all speculation. But it is noticeable that he charges these portions on the estates. If he was intending to reserve the power of overreaching this charge by the subsequent jointuring of a wife, he would surely have been expected to reserve that overreaching power when he was dealing with priorities, as indeed he was in the paragraph which I have read. Subsequently, by his will, he jointured his second wife.

Mr. Pascoe Hayward, for the widow, relied strongly on the great name of Lord St. Leonards. I am reading from Farwell on Powers, 3rd ed., at p. 577, where Lord St. Leonards is cited²: “If the rule is universally in favour of portions, there is no distinction between a jointure and portions; but either, when raised by means of a power, will prevail over the other if actually created by the settlement itself. There would, however, be no difficulty in drawing a distinction between the two charges which is pointed out by their nature. Where they come into competition, the jointure should precede the portions. Where both are created by powers, and although the portions are first charged, a jointure would, it is apprehended, prevail over portions.”

They are both here created by the exercise of powers and the portions were first charged. But, says Lord St. Leonards, a jointure would, it is apprehended, prevail over portions. I must confess that I do not quite know to what situation Lord St. Leonards was referring when he said that. Was he referring to the case of a jointure in favour of a widow after the life interest of

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² Sugden on Powers 487, after discussing *Beale v. Beale* (1713) 1 P. Wms. 244, and, on appeal, Gilb. Eq. R. 93.

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her husband, as compared with portions in favour of the children of the marriage; or was he speaking in entirely general terms so as to comprehend in his statement the relative positions of the children of the first marriage and the widow of the second marriage, who was not, therefore, the mother of the children? I really do not know. Moreover, I feel that broad statements of that character made without any regard to the circumstances of a particular case might be dangerous. The basis, I understand, of Lord St. Leonards' observations is a surmise as to the intention of, I suppose, the person exercising the powers. But, after all, if it is permissible to surmise at all, it is better to surmise in the light of the circumstances surrounding the particular case. Even then surmise is a most unruly horse.

In this particular case it is easy to draw equal and opposite surmises at almost every point. I cannot but think that the principle to be applied is this. If a person charges property with charges which are to take effect at the same time, and nothing is said directly or indirectly about priority, it seems to me that they ought to rank *pari passu*, on the general principle of equity, that if there is a deficiency which is not anticipated when the documents are drafted, the right course is to apportion the burden of the deficiency. In this case I think it goes further. I think myself that there is a clear indication in the deed of appointment that a widow was not to have priority over the portions. I think that the form of the document itself by implication shows that.

Mr. Wright, for the portioners, asks me to go further and say that that document also shows that the portioners were to have priority over the widow. I do not think so. It is not as if a mortgagor were mortgaging his house in favour of a number of different mortgagees. Here there is a person exercising a power under a family settlement, and I should need strong words to convince me that merely because the appointor did not reserve the right to create in favour of his widow a jointure ranking *pari passu* with portions that he was to be deemed to have surrendered that right. Therefore, giving the matter the best attention that I can—I must confess that it is not easy—I arrive at the conclusion that if there is a deficiency the widow and the portioners rank *pari passu*.

Declaration accordingly.

Solicitors: *Cunliffe & Airy, for Knight & Sons, Newcastle-under-Lyme; Hunters; Nicholl, Manisty, Few & Co.; Royds, Rawstorne & Co.*

F. R. D.

HIGGS (INSPECTOR OF TAXES) v. OLIVIER.

C. A.

Revenue—Income tax—Actor—Payment under covenant not to act for a period—Capital not income—Not subject to tax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Case II.

1952
Jan. 31;
Feb. 1, 4.

Evershed M.R.,
Singleton and
Hodson L.JJ.

A well-known actor made an agreement with a film company by which in consideration of £15,000 he agreed not to act in, or produce or direct any film anywhere for a period of 18 months, except for the company. The object of the agreement was to protect the exploitation of a film which he had produced for that company and in which he had acted the principal role under an earlier agreement with them.

The sum of £15,000 was included in his assessment to income tax as part of his income from his vocation as an actor under Case II of Sch. D to the Income Tax Act, 1918. The Commissioners for the Special Purposes of the Income Tax Acts discharged the assessment, holding that the £15,000 did not come to the taxpayer from the exercise of his vocation, but from refraining from carrying on that vocation:—

Held, (1) that it was not possible to say in a case of this kind, which involved a consideration of the true import and scope of taxing provisions, that the whole matter was one of fact. It was a question of mixed fact and law. It might be a question of degree. In that case, so long as it did not appear that the Special Commissioners had misapprehended the effect of the taxing provisions, their decision should not be disturbed. Treating the question as one of fact, the decision of the commissioners that the sum of £15,000 did not come to the taxpayer as part of the income of his vocation should stand; (2) that on the footing that all the facts having been fully set out in the special case there was nothing left but a question of law, the sum which the taxpayer received was outside the formula "profits or gains arising or accruing" "from" the taxpayer's "profession" or "vocation" as an actor. The sum accordingly was not taxable under Case II of Sch. D. of the Income Tax Act, 1918.

The observations of Lord Normand in *Kelsall Parsons & Co. v. Inland Revenue Commissioners* (1938) 21 Tax Cas. 608, 619; 1938 S.C. 238 applied.

Glenboig Union Fireclay Co. Ltd. v. Inland Revenue Commissioners (1922) 12 Tax Cas. 427; 1922 S.C.(H.L.) 112, and *Beak v. Robson* [1943] A.C. 352 considered.

Decision of Harman J. [1951] Ch. 899 affirmed.

APPEAL from Harman J.¹

On September 12, 1943, Two Cities Films Ltd. entered into an agreement with the respondent taxpayer, Sir Laurence Olivier,

¹ [1951] Ch. 899.

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in connexion with the screen presentation of *Henry the Fifth*. Work on production of the film had already begun at that date, as the main obligations undertaken by the taxpayer under the agreement were deemed to have begun on June 1, 1943, and were to be for a period of 12 weeks, continuing until the end of September, 1944, if necessary, in order to finish the film. The taxpayer was to produce, direct and act the principal part in the film, and he was to receive a certain sum in consideration for those services. By clause 14 it was provided that during the currency of the agreement he should devote the whole of his time to the company's service. The agreement was completely carried out.

The film was shown in London and New York about Christmas, 1944. It made its way rather slowly in England, and in July, 1945, was still being shown only in London.

According to the taxpayer's evidence (which was accepted by the commissioners), during a discussion as to the best way of promoting interest in the film, it was agreed that it would be an advantage if he did not appear in any other film or films for a period. He said that he could not afford to do that, although he regarded it as desirable. After some discussion a further agreement was made between the taxpayer and the film company on July 18, 1945, to assist the exploitation of the film.

That agreement, after reciting his services to the company in connexion with *Henry the Fifth*, and that the company had requested him to enter into a restrictive covenant, provided for the payment to him of £15,000, and he in return covenanted during 18 months from the date of the deed not to act in, direct or produce any film or films to be produced either in the United Kingdom or the United States or elsewhere for anybody other than the company. There was no engagement to serve the company, and no obligation on the company to employ him. The taxpayer's evidence was that, during the 18 months in question, he received a number of tempting offers to appear in films, which he was accordingly obliged to refuse.

The taxpayer was assessed to income tax for the year 1946-47 under Case II of Sch. D to the Income Tax Act, 1918,² in respect of the profits and gains of his vocation as an actor for a sum which included the £15,000 payable under the covenant.

² By Case II of Sch. D to the Income Tax Act, 1918, tax is charged "in respect of any profession, em-

ployment, or vocation not contained "in any other schedule. . . ."

It was contended on his behalf that the £15,000 arose under the deed of 1945 alone, and that it was not paid for any activity by him in the exercise of his vocation and, accordingly, was not a taxable receipt.

It was contended for the Crown that the agreement of 1943 and the deed of 1945 related to the same matter and were interdependent; and that, even if they were not interdependent, the sum of £15,000 arose from the taxpayer's vocation as an actor, and formed part of his taxable income from that vocation.

The commissioners held that the agreement and the deed of covenant could not be read together, and that the taxpayer had performed all his services under the former before the latter came into existence. They decided that the sum of £15,000 did not come to the taxpayer as part of the income from his vocation, but, on the contrary, came to him for refraining from carrying on his vocation, and in their opinion it was a capital receipt, and not income.

The Crown appealed from that decision.

Harman J. dismissed the appeal of the Crown from the decision of the Special Commissioners.¹

The Crown appealed.

Sir Frank Soskice K.C. and *R. P. Hills* for the Crown. The sum of £15,000 paid to the taxpayer in consideration for his agreeing for 18 months not to act in, direct or produce any film anywhere for anybody other than the Two Cities Films Ltd. should be included as part of his income as an actor and be assessed to income tax under Case II of Sch. D to the Income Tax Act, 1918. The question really is whether he gets the sum of £15,000 as a profit of his profession.

[EVERSHED M.R. What would you say as to a payment to a doctor in consideration of his not exercising his profession within a specified area as a protection to the goodwill of the partnership he is leaving?]

The sum received would be equally taxable. That may be contrasted with a case where the assets of a company are sterilized or destroyed as in the case of a mining company which received a consideration for leaving pillars to support a railway: *Glenboig Union Fireclay Co. Ltd. v. Inland Revenue Commissioners*.³ Here the sum of £15,000 was a payment to the

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³ (1922) 12 Tax Cas. 427; 1922 S.C. (H.L.) 112.

C. A. taxpayer arising from his profession, which he would not receive
1952 if he were not such a skilled person.

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[EVERSHED M.R. May it not be said that the sum of £15,000 is not earned from his profession but arises from his agreeing not to exercise it?]

He is not prevented entirely from acting on the stage but only from acting or having to do with films for anyone other than the particular company. In this case the covenant does not prevent the covenantor for ever from exercising his profession. [They referred to *Burmah Steamship Co. Ltd. v. Inland Revenue Commissioners*⁴; *Ensign Shipping Co. Ltd. v. Inland Revenue Commissioners*⁵; *Charles Brown & Co. v. Inland Revenue Commissioners*⁶; *Short Brothers Ltd. v. Inland Revenue Commissioners*⁷; *Inland Revenue Commissioners v. Newcastle Breweries Ltd.*⁸; and *Waterloo Main Colliery Co. Ltd. v. Inland Revenue Commissioners*.⁹]

Secondly, it is submitted that this payment was an income payment. If a trader or a professional man receives a payment for disposing of his capital assets or for sterilizing such assets for a substantial period, that is a capital payment. However, if he receives a payment for giving something up and he loses trading opportunities but he does not part with any capital asset, that is an income payment. [They referred to *Margerison (Inspector of Taxes) v. Tyresoles Ltd.*¹⁰; *Van den Berghs Ltd. v. Clark (Inspector of Taxes)*¹¹; *Kelsall, Parsons & Co. v. Inland Revenue Commissioners*¹²; *Hearn (Inspector of Taxes) v. Morgan*.¹³]

Harman J. treated this question as being one of fact. It is submitted that the authorities show that it is a mixed question of fact and law. The findings of the commissioners as to the facts are not conclusive. The court has to do two things: First, find what are the facts; second, determine how the statute operates having regard to the facts which have been found. The second process involves a question of law. [They referred to *Odhams Press Ltd. v. Cook*¹⁴; *Glasson (Inspector of Taxes) v. Rougier*¹⁵; *Union Cold Storage Co. Ltd. v. Adamson*¹⁶; *Bean*

⁴ (1930) 16 Tax Cas. 67; 1931 S.C.
156.

⁵ (1928) 12 Tax Cas. 1169.

⁶ (1930) 12 Tax Cas. 1256.

⁷ (1927) 12 Tax Cas. 955.

⁸ (1927) 12 Tax Cas. 927.

⁹ (1947) 29 Tax Cas. 235.

¹⁰ (1942) 25 Tax Cas. 59.

¹¹ [1935] A.C. 431.

¹² (1938) 21 Tax Cas. 608; 1938
S.C. 238.

¹³ (1945) 26 Tax Cas. 478.

¹⁴ (1940) 23 Tax Cas. 233.

¹⁵ (1944) 26 Tax Cas. 86.

¹⁶ (1931) 16 Tax Cas. 293.

(*Inspector of Taxes*) v. *Doncaster Amalgamated Collieries Ltd.*,
per Scott L.J.¹⁷]

F. Grant K.C. and *P. M. B. Rowland* for the taxpayer. If this is a question of law the commissioners were right. The decision in *Beak (Inspector of Taxes) v. Robson*¹⁸ is a similar case to this. There it was held that a payment of £7,000 as consideration for a covenant not to engage in trade within 50 miles of the covenantees' business premises was not assessable to tax because it was not a profit arising from the covenantor's office. *Billam v. Griffith (Inspector of Taxes)*¹⁹ also supports the taxpayer's submission. In *Glenboig Union Fireclay Co. Ltd. v. Inland Revenue Commissioners*²⁰ the taxpayer had only sterilized a small part of its assets. The taxpayer in this case sterilized a very large part of his assets. It is submitted that the cases cited for the Crown are not relevant in this case.

The taxpayer here was paid for not acting. Prima facie that was not a payment for the exercise of his profession. For it to be taxable the Crown must show that payments of this kind are frequently made to actors. There was plenty of evidence establishing the fact that this payment was not derived from the exercise of the taxpayer's profession. The commissioners reached a right conclusion. Whether it is regarded as a question of fact or law, Harman J. reached the right conclusion.

EVERSHED M.R. This appeal relates to a claim on the part of the Crown to tax under Sch. D of the Income Tax Act, 1918, a sum of money which was paid to the taxpayer in consideration of a restrictive covenant against exercising his profession as an actor, albeit qualified in certain respects, which he entered into with the Two Cities Films Ltd.

The findings of the commissioners make it plain that the agreement was of a very unusual character. They accepted the evidence of the taxpayer that so far as he was concerned he had never entered into such a covenant before, and it was made no less clear that covenants of this character cannot be regarded as in the ordinary run of the profession or vocation of actors. I say that at once, because I think it is important in cases of this kind that the decision should not be thought to stray beyond the limits of the matters submitted for determination. The conclusion which I reach, which is in accord with that of Harman J.,

¹⁷ (1946) 27 Tax Cas. 296, 305.

¹⁸ [1943] A.C. 352.

¹⁹ (1941) 23 Tax Cas. 757.

²⁰ 12 Tax Cas. 427; 1922 S.C.

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C. A. is one which is related, and related only, to the rather unusual facts of this rather unusual case.

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[His Lordship stated the facts.] In order that the sum in question may be liable to income tax under the schedule, it must fall within the proper significance of the relevant words; it must be "profits or gains arising or accruing from the taxpayer's profession or vocation as an actor." The argument, which has been considerable and has involved the study of a large number of cases, has ranged round that apparently simple question. It is undoubtedly true that the payment of this large sum was something which the taxpayer was able to obtain because of his high credit as an actor upon the films. In the broadest sense, therefore, it might be said to be something which he got out of being an actor, which he got in his capacity as an actor. Again (as it was forcibly put on behalf of the Crown) this restriction was a service which the taxpayer, in his capacity as an actor, was able to perform for the company; because by refraining from acting he, so to speak, protected the company from the risk of his own competition. But those approaches to the matter involve, as I think, too loose and liberal a construction of the simple words which I have quoted. According to their ordinary sense, profits or gains in order to be taxable must "arise or accrue from a profession," in the sense that they arise from the exercise of the profession. I agree that so stated it is not a necessary answer to Sir Frank's case, because (for reasons I have already indicated) it might be said that this service was after all an exercise, in a sense, of his profession or vocation; but not, I think, in a proper or ordinary sense.

I will say what has to be said about the many cases cited, but it is right first to observe and emphasize one matter of fact found by the Special Commissioners, namely, that the two deeds, the original deed of employment and the deed containing the restriction, were in no sense inter-connected; they were not part of one transaction. There is no suggestion that there is any subterfuge here, or that these deeds did not give effect to what they purport to represent. I also refer again to the finding that restrictive covenants of this sort are in no ordinary sense to be regarded as being in the run of an actor's profession.

All the cases cited, it seemed to me, with one or two possible exceptions, were far from this case. I am not for one moment suggesting their citation was not proper or useful. They were cases which tended to establish this important proposition: that

many sums of money received in the course of carrying on a trade, but not as a result of the trade as it was contemplated that it would be carried on in the normal course, may nevertheless be taxable. Cases were cited arising out of the restrictions placed upon trading companies during the first world war. For example, there was the case of *Inland Revenue Commissioners v. Newcastle Breweries Ltd.*,²¹ where rum produced by a brewery company was requisitioned by the Admiralty and compensation paid; there were cases where contracts for shipbuilding were cancelled; and so on. In those cases it was decided by the courts that the sums paid by way of compensation were taxable.

I think one reference to the judgment of Rowlatt J. in *Short Brothers Ltd. v. Inland Revenue Commissioners*²² will suffice for my purpose, which is to show that, in all these cases where the sums received were taxable, they were treated as taxable because they arose in the course of the conduct of the business and from that business as it was being carried on, by and large, in the ordinary way. Rowlatt J. said this²³: "It was, I think, simply "a receipt . . ."—it was the receipt of £100,000 by way of compensation because certain ships could not be built—" . . . in the "course of a going business, from that going business—nothing "else." In the same case, in the Court of Appeal, Lord Hanworth M.R. observed²⁴ that in that case there was no question of any restrictive covenant having been entered into by the company. "The company did not enter into any restrictive "covenant that they would not use the slips, during the two and "a half years, that the vessels number 414 and number 416, if "they had been built, would have occupied; not at all."

On the other side there are cases—the *Glenboig* case,²⁵ as it is called, has been referred to—where the moneys received for the sale of an asset, or for what is the equivalent of a sale or disposition of an asset, have been held not to be taxable. In the *Glenboig* case²⁵ the question arose out of the well-known provisions which apply when a railway company require a mining company not to undermine the railway, and compensation has to be paid to the mining company in consequence. The *Glenboig* company undertook not to mine one and a half acres (out of a total "take" of about 1,800 acres) underneath the railway. I think that there is a true analogy between such an arrangement as that or between a sale of one of a trader's capital assets and a

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²¹ 12 Tax Cas. 927.²² 12 Tax Cas. 955.²³ Ibid. 968.²⁴ Ibid. 973.²⁵ 12 Tax Cas. 427.

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restrictive covenant of a substantial character entered into by a trader relating to trading. I think Sir Frank Soskice was disposed to agree that, if a trader, or a professional man, for a money consideration covenanted to give up his trade or profession for the rest of his life, then it would be difficult to say that the money was received was "profits or gains accruing or arising from his trade or profession." On the other hand, it is not difficult to see that a restriction of a very limited or partial character might less easily be taken out of the ambit of the taxing provision. One example in the argument was that of an actor who covenanted for a limited period not to act for one particular company out of a large number. I myself gave the example of an actor who covenanted for a limited period not to act under his own or well-known stage name. But between the two extremes there is a large area, and for myself I am disposed to think that within that area it may well be a matter of degree. In so far as it is a matter of degree it would be, I think, a question of fact.

In this case the Special Commissioners concluded that the £15,000 was not within the taxing provisions I have quoted. "We found it impossible to say that the sum of £15,000 under the deed came to the taxpayer as part of the income from his vocation. On the contrary, it came to him for refraining from carrying on his vocation, and in our opinion was a capital receipt." I agree that in questions of this kind which involve a consideration of the true import and scope of the trading provisions, it is not possible to say that the whole matter is one of fact. It is, I think, a question of mixed law and fact. But I think that, if I am right in saying that in such a case as this it may well be a matter of degree, then so long as it does not appear that the Special Commissioners have misapprehended the effect of the taxing provisions their decision should not be disturbed. That was Harman J.'s first approach to this case, and I am of the same opinion.

But I will assume, as he did, that the facts having been set out fully in the case stated there is nothing really left but, as a matter of law, to apply to them the words I have already quoted from the Act. Still I reach, as he did, the conclusion that the decision in favour of the taxpayer is correct.

Before I leave this matter of degree and of questions of fact I would like to quote, as Harman J. quoted, the language of Lord Normand when he was sitting as Lord President of the Inner

House of the Court of Session in Scotland in the case of *Kelsall Parsons & Co. v. Inland Revenue Commissioners*²⁶: "It has been said by Lord Macmillan in *Van den Berghs Ltd. v. Clark*²⁷ that the question whether a particular receipt should be dealt with as an income receipt or as a capital receipt cannot be solved by reference to any provisions of the Income Tax Act, and that no infallible criterion emerges from a consideration of the case law. Each case depends upon its own facts, and in this case the facts, which seem to me not to be closely analogous to the facts in any of the cases cited to us, lead me to the conclusion that the determination of the commissioners should stand. The sum which the appellants received was, as the commissioners have found, paid as compensation for the cancellation of the agency contract." Then he considers the facts of the case before him, and on the facts treats the case as being in *pari materia* with the class of case of which that of *Short Brothers*,²⁸ which I have already mentioned, was another illustration.

In none of the many cases, except that of *Beak v. Robson*,²⁹ cited by Mr. Grant, was the question before the court whether a sum paid in consideration of a covenant in restraint of trade was within or without the taxing provision. *Beak v. Robson*²⁹ was a case where the sum of £7,000 was paid in consideration of a covenant by a director and manager that, after the end of his services, he would not enter into competition with his former employer for a limited period. I think that case is useful as an illustration of the kind of approach which should be made in considering the application of the taxing provision to covenants of this character. The case was not, of course, the same, on its facts as the present; but I do not think that the differences are of the essence of the matter. I follow the point that the restriction here is limited; it only relates to film acting and only excludes services with companies and persons other than the Two Cities Films Ltd. The taxpayer was free to act on what is called the legitimate stage; he was free, I take it, to undertake broadcasting work if he felt so disposed; and he was free to act for the Two Cities Films Ltd. if they asked him to do so, which in fact they did not. Still it was a substantial piece, so to speak, out of the ordinary scope of the professional activities which otherwise were open to him. It was, in other words, a restriction extending to

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²⁶ 21 Tax Cas. 608, 619.²⁷ [1935] A.C. 431, 438.²⁸ 12 Tax Cas. 955.²⁹ [1943] A.C. 352.

C. A. a substantial portion of the professional activities which were
1952 open to him. The sum he received therefore cannot properly, in
my view, be regarded—and I now treat the question as *res integra*
—as money which came to him (and which he received) “from”
—that is “in”—“the ordinary course of the exercise of his
“profession.” Nor do I think that such a conclusion involves
the difficulty which Sir Frank Soskice indicated, and which
arises out of clause 14 of the original service agreement. We
are, however, not concerned with that question. If the taxpayer
said that some part of his salary under that agreement had not
to be taxed because it was referable to the restriction he then
entered into against acting for anyone else, that question could be
decided; and I should expect to find it decided adversely to him
on the ground that it was an ordinary incident of his profession
that when an actor undertakes a particular job of this kind he
has to give, for the period of that job, his whole time and attention
to it. But we are not determining that case. Harman J. has
treated the matter as properly determined by the Special Com-
missioners. But he has also said (and I agree with him) that in
any case the sum of money in question is outside the proper
scope of the formula “profits or gains arising or accruing from
“the taxpayer’s profession or vocation as an actor.”

I said at the beginning, and I repeat it, that the case depends
entirely upon its own peculiar facts, all of which have been found
and set out in the case stated. For the reasons which I have
given I think that this appeal fails and should be dismissed.

SINGLETON L.J. I am of the same opinion. The case is an
interesting one. The question before the court is one which
frequently comes up for decision, but I think it may be said that
it has never come up before on facts quite like the facts of this
case. Probably that is the reason why little help is to be found
from the very large number of authorities which were cited to us.

The contentions put forward on behalf of the Crown before
the Special Commissioners were, first, that both the agreement
of September, 1943, and the deed of July, 1945, related to the
same matter and were interdependent; and, secondly, that even
if they were not interdependent the sum of £15,000 arose from
the taxpayer’s vocation as an actor and formed part of his taxable
income from that vocation. The first of those contentions was
clearly a question of fact, and it was disposed of by the com-
missioners’ finding of fact. The second presents more difficulty,

and it must be examined in the light of the facts which were found.

Let me state in a sentence or two the facts which were found, as to which really there is no dispute. First: work under the agreement had been completed and had ceased before the deed of 1945 came into existence—as is recited in the deed. There is no suggestion that this was a device to avoid taxation. It cannot be said that the £15,000 was in any sense a payment for producing the film. On the facts as found, it must be taken that the agreement of 1943 and the deed of 1945 were separate and distinct. Accordingly, the commissioners found that the agreement of 1943 and the deed of 1945 could not be read together. Secondly: the taxpayer gave evidence that the restrictive covenant into which he entered in the deed was the only one of its kind into which he had ever entered, and his evidence was accepted by the commissioners. Furthermore, there was nothing before the commissioners to show any like case, or that any other actor had ever been a party to a deed of this nature. Thirdly: the £15,000 was paid in consideration of the promise that the taxpayer “will not during a period of 18 months from the date “of this deed appear as an actor in or act as producer or director “of any film to be produced either in the United Kingdom of “Great Britain or the United States of America or elsewhere for “any company, firm or persons other than the company,” that is, Two Cities Films Ltd.

On these facts it was for the commissioners to ask themselves on which side of the line the case fell. In other words, what was the true inference to be drawn upon those facts? It was not purely a question of fact for their decision. The Crown submitted that the sum of £15,000 was part of the annual profits or gains arising or accruing to the taxpayer from his profession, employment or vocation. That was contested by counsel on behalf of the taxpayer. In the case the commissioners state their conclusion in this way: “We found it impossible to say that the sum “of £15,000 under the deed came to the taxpayer as part of the “income from his vocation.” Whether it be, as one side contended, a question of fact or whether it be, as I think, rather a question of mixed fact and law, I am of the opinion that the conclusion at which the commissioners arrived was correct. I do not feel that it was shown that the £15,000 was “profits or gains” from the vocation of the actor. Indeed, it was a payment for abstaining from following his vocation. In those circumstances

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I agree with the conclusion of the commissioners and with the judgment of Harman J., and I agree that this appeal must be dismissed.

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HODSON L.J. The question for determination is whether the sum of £15,000 received under the deed of July 18, 1945, was a receipt of income from the taxpayer's vocation. Bearing in mind what was said by Lord Normand in the case of *Kelsall Parsons & Co. v. Inland Revenue Commissioners*,³⁰ quoting the language of Lord Macmillan in the case of *Van den Berghs Ltd. v. Clark*,³¹ in my view the question here is a mixed question of fact and law. I am inclined to the view put forward by the Crown that it is mainly a question of law, depending on the construction of the word "from."

The first contention of the Crown was that the agreement of September, 1943, and the deed of July, 1945, related to the same matter and were interdependent; that is to say, the £15,000 paid on the second agreement was in reality additional remuneration for the taxpayer, who was an actor, in respect of his acting for the company with which both the agreements were made. The commissioners, however, found as a fact that the taxpayer had performed all his services under the agreement before the deed came into existence, and so I think the question whether the two agreements were interdependent is no longer a live one. The only question remaining is whether the sum of £15,000 under the deed came to him as part of the profits of his vocation.

I will not repeat the provisions of the deed, but I feel that the case is very closely paralleled by that of *Beak v. Robson*.³² In that case a director had an agreement with his company as director and manager for five years at a salary, and there was an additional agreement that if his employment should be determined, in consideration of the payment of £7,000 payable to the director by the company, the director promised not directly or indirectly to carry on the business of coal exporter, etc., for a period of five years after the determination of his contract. The case went to the House of Lords, and Lord Simon L.C., in his speech, said³³: "In the agreement before us, the obligations "flowing from the contract of service and the remuneration to be "received by the respondent in respect of that service are entirely "separate from the restrictive covenant and the consideration

³⁰ 21 Tax Cas. 608, 619; 1938 S.C. 238.

³² [1943] A.C. 352.

³³ *Ibid.* 355.

³¹ [1935] A.C. 431, 438.

“which is given for it. The sum of £7,000 is not paid for any thing done in performing the services in respect of which he “is chargeable under Sch. E.” I should point out that this sum of £7,000 was alleged to be a profit arising from the respondent’s office, and not, as here, one arising from a vocation. But the principle is the same, and I think the cases are parallel.

It is quite true that in that case the argument could not be put forward which is based on clause 14 of the agreement, but the answer to that point seems to be, as the Master of the Rolls pointed out, that the taxpayer has not taken the point that clause 14 enables him to say that part of his salary payable under the original agreement is attributable to services rendered to the company and part to refraining from working for any other company. I agree that had he taken the point, it would have been likely to fail, because it would be said that the two parts were bound up together and no severance was possible. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Solicitor, Inland Revenue; Walter, Burgis & Co.*

B. A. B.

In re STEVENS, DECED. PATEMAN *v.* JAMES.

[1951 S. 4867.]

WYNN.
PARRY J.

1952
Feb. 28.

Will—Construction—No named executor—Named beneficiaries—Subject-matter given left blank—Effect.

A testatrix, by her will made on a printed form, after leaving blanks in the spaces for the names of the executors, continued “I “give devise and bequeath unto my brother H, also sister J also “sister E.” After a further blank space, the will was signed and attested in proper form.

J predeceased the testatrix. On the hearing of a summons taken out to ascertain the effect of the provisions of the will:—

Held, that the testatrix intended to deal with the whole of her property by leaving it to the named beneficiaries; so that the surviving brother and sister took the estate in equal shares as joint tenants.

In re Harrison (1885) 30 Ch.D. 390, applied; *In re Bassett’s Estate* (1872) L.R. 14 Eq. 54; *In re Messenger’s Estate* [1937] 1 All E.R. 355, and *In re Turner* [1949] 2 All E.R. 935, followed.

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The testatrix made her will on a printed form as follows:—
“ This is the last will and testament of me, Mrs. Ellen Stevens,
“ of 43 Caversham Road, in the County of St. Pancras, —
“ made this — day of 4th March in the year of our Lord one
“ thousand nine hundred and 34. I hereby revoke all wills here-
“ tofore made by me. I appoint — of — in the county of
“ — and — of — in the county of — to be executors
“ of this my will. I give devise and bequeath unto my brother
“ [name and address] Also sister [name and address] Also
“ sister [name and address] ” followed by a blank, followed by
a signature and attestation in proper form. One of the sisters
predeceased the testatrix.

The summons raised the question whether, on the true construction of the will, any, and if so, what part of the estate passed to the surviving brother and sister, or whether there was an intestacy.

J. L. Arnold for the administrator with the will annexed.

J. Semken for the beneficiaries. There is a strong presumption against intestacy, where a will has been executed: see the observations of Lord Esher M.R. in *In re Harrison*.¹ In *In re Bassett's Estate*,² *In re Messenger's Estate*,³ and *In re Turner*⁴ executors were appointed, but that fact did not so affect the ratio decidendi as to distinguish them from the present case. The surviving brother and sister should take the whole of the estate.

A. A. Baden Fuller for the next-of-kin. The gift fails for uncertainty. “ Give, devise and bequeath ” can have no effect unless both the donee and the subject-matter are indicated. In the cases cited the appointment of executors showed an intention to deal with the whole of the estate. In the present case, where there are no executors, the intentions of the testatrix are uncertain, and an intestacy results.

WYNN-PARRY J. The question is whether the will operates to pass any and, if so, what part of the property to the brother and the sister who survived the testatrix, or whether it was completely ineffective to pass any of her property.

I have been referred to certain authorities. In the first place there is the dictum frequently quoted from the judgment of Lord

¹ (1885) 30 Ch.D. 390, 393-4.

² (1872) L.R. 14 Eq. 54.

³ [1937] 1 All E.R. 355.

⁴ [1949] 2 All E.R. 935.

Esher M.R. in *In re Harrison* ⁵: "There is one rule of construction which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule." To my mind, that language makes it clear that Lord Esher was intending to enunciate a rule of general application. I say that because the facts of the case which he had to consider were materially different from the facts of the present case, in that the gap there consisted not in the omission of the property proposed to be dealt with, but of the person or persons proposed to be benefited by the disposition of the property of the testatrix.

There are three cases somewhat similar to the present case which have been referred to. The first is *In re Bassett's Estate*.⁶ In that case the testatrix made a will "which she declared to be her 'last will and testament'"—a declaration which finds its place in the will which I have to construe—"and thereby appointed an executor, and, after giving legacies, proceeded as follows: 'After these legacies and my doctor's bills and funeral expenses are paid, I leave to my sister.' M. P., 'without any power or control whatsoever of her husband,' J. P., 'in case of her death to be equally divided amongst her children or grandchildren,'" and then followed a blank. It was held by Bacon V.-C. that there was a good gift of the residue to the sister. He said⁷: "I read the will as containing a disposition of the whole of the testatrix's estate and effects. That must have been her intention, as is generally the case, when she set about making her 'last will and testament.' That would vest the whole of her estate in the executor." Pausing there, it will be seen from the statement of facts in *In re Bassett's Estate* ⁶ that the testatrix there appointed an executor, and, as judges always do, the Vice-Chancellor adverted to that circumstance as one which aided him in coming to the conclusion at which he arrived. But it is necessary not to lose sight of the context in which he refers to the vesting of the estate in the executor. It is because he assumes from the form of the will, which, in being entirely in blank as to the property intended to be dealt with, is similar to the will with which I have to deal, that the presumption should be that the will intended to deal

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⁵ 30 Ch.D. 390, 393.

⁷ Ibid. 57.

⁶ L.R. 14 Eq. 54.

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with the whole of the testatrix's estate and effects. In the upshot, the Vice-Chancellor held that the will operated to pass the whole of the testatrix's property.

In the later case of *In re Messenger's Estate*⁸ Clauson J. had to consider the will of a testator which was on a printed form by which he appointed a named person to be his executor. After providing for the payment of the testator's debts, funeral and testamentary expenses, the will provided: "I give and bequeath — to," and then followed the name of the executor. His Lordship held "upon a consideration of the testator's intention expressed in the will" that the person named as executor "was beneficially entitled to the whole of the testator's estate." In the course of his judgment Clauson J., having referred in detail to the form of the will, said⁹: "In my view it is quite plain from this document that the testator desired to make an effective will, and in that connexion I need only refer to the observations of Lord Esher M.R. in the case of *In re Harrison, Turner v. Hellard*,¹⁰" and then he quoted the "golden rule" which I have already read. He continued: "It is quite plain in this case that the testator intended to dispose of his property, otherwise what he was doing was a solemn farce." The next sentence is: "Another thing which is perfectly plain is this, that he intended in some way or other to benefit Mrs. E. A. Chaplin," who was the lady named as executrix. I read those two sentences as indicating that his Lordship was dealing with two different subject-matters. In the first sentence he was dealing with what in his view was the intention of the testator as regards the disposition of his property, and he held that the testator intended to dispose of the whole of his property for the reason which he gives and which is based upon the golden rule, namely, otherwise what he was doing was a solemn farce. Having come to that conclusion, he then intended to pass on and deal with the question, who was intended to be benefited by this intention? He said: "In my view, it appears with reasonable clearness on the face of this will that the extent to which he desired to benefit her was to the extent of the whole of his property, which he was vesting in his executrix, who happens to be named as beneficiary, by means of appointing her executrix." There are, therefore, three elements. The first, a conclusion that the testator intended to dispose of the whole of

⁸ [1937] 1 All E.R. 355.

¹⁰ 30 Ch.D. 390.

⁹ Ibid. 356.

his property; secondly, that he intended in some way to benefit the person named as executrix; and, thirdly, that he intended to benefit her to the extent of his whole estate. I do not find in that reasoning anything which would lead me to the conclusion that the only reason why Clauson J. was able to hold that the testator had effectively disposed of the whole of his estate to the named person was because she was named as executrix.

The last case to which I need refer is *In re Turner*.¹¹ That was a decision of Danckwerts J. on a will made on a printed form by which a testator appointed two named persons to be his "executor" in the singular and directed the payment of his debts and funeral expenses "as soon as conveniently might be after his decease." The will proceeded: "I give and bequeath unto," and under those words was written the names of 11 persons, one name on each line, including the first person appointed executor. Immediately under the last of the names were written the words "my gold wrist watch to go" to the named person. His Lordship held that "the gift of the gold watch was an afterthought, and as the testator must be taken not to have intended to die intestate it was reasonably clear that he intended to give all his property to the 11 persons named who were therefore jointly entitled to the whole of the residuary estate apart from the gold watch." It is true that, as in the two earlier cases to which I have referred, the will appointed an executor or executrix. But the problem which Danckwerts J. had to consider was really whether or not the case before him could be distinguished from the case of *In re Messenger's Estate*¹² by reason of the fact that a specific gift followed the alleged gift of residue. He came to the conclusion that the specific gift in the will which he had to consider appeared as an afterthought and, therefore, the case was not distinguishable from the earlier case.

On a consideration of those three authorities, I come to the conclusion that the omission of any appointment of executors is insufficient to enable me to distinguish this case from the earlier cases, and that it sufficiently appears from the form of the will in which it was admitted to probate that this testatrix intended by this form of will to deal with the whole of her property and to deal with it by leaving it to the brother and the two sisters, and that, as the elder of the two sisters predeceased her, the result is that the will is effective to pass the whole of the testatrix's estate

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¹¹ [1949] 2 All E.R. 935.

¹² [1937] 1 All E.R. 355.

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to the brother and the second named sister, who will be entitled to the property in equal shares as joint tenants.

Declaration accordingly.

Solicitors: *Walter A. Jennings & Son; W. A. L. Osborn.*

F. R. D.

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In re A SOLICITOR.

[1951 M. 234.]

Solicitor—Bankruptcy—Client account not vested in trustee in bankruptcy—Removal of solicitor from trusteeship of client account and appointment of new trustees—Procedure—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 18, 38 (1)—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 41 (1)—Solicitors Act, 1933 (23 & 24 Geo. 5, c. 24), ss. 1, 8 (1)—Solicitors Act, 1941 (4 & 5 Geo. 6, c. 46), Sch. 1, para. 5—Solicitors' Accounts Rules, 1945 (S.R. & O. 1944, 781.L.34), rr. 2 (1), 3, 4.

A solicitor was adjudicated bankrupt and the Law Society subsequently obtained an order freezing his three bank accounts, of which one was a client account under the Solicitors Act, 1933 and the Solicitors' Accounts Rules, 1945. His trustee in bankruptcy took out a summons asking that the bank, notwithstanding the stop order, might be at liberty to pay any moneys out of any account in the solicitor's name to the trustee in bankruptcy while acting as such:—

Held, (1) that the chose in action represented by the client account was "property held by the bankrupt in trust for any other "person" within section 38 (1) of the Bankruptcy Act, 1914 and accordingly did not vest in the trustee in bankruptcy under section 18 of the Act; *Plunkett v. Barclays Bank Ltd.* [1936] 2 K.B. 107, 117 and *Loescher v. Dean* [1950] Ch. 491 applied; (2) that, as there was no dispute of fact, the application to the court to remove the solicitor from the trusteeship of the client account could be made by originating summons; *In re Henderson* [1940] Ch. 764 followed.

Semble, the court would be inclined to appoint two trustees in his place, namely, the nominee of the Law Society and the trustee in bankruptcy.

ADJOURNED SUMMONS.

On February 7, 1951, the solicitor was adjudicated a bankrupt. On March 6, 1951, the Law Society obtained from the Chancery

Division an order under Sch. I, para. 5, to the Solicitors Act, 1941, freezing his bank accounts, of which he had three. Two were overdrawn, and the third was his client account under the Solicitors Act, 1933, and the Solicitors' Accounts Rules, 1945, in which there was a large sum of money.

By letter dated March 22, 1951, the solicitor of a company which was a creditor in the bankruptcy claimed on that company's behalf payment of any moneys in the client account identifiable as, or attributable to, that company's moneys. If that claim was established, the solicitor's trustee in bankruptcy wished to pay the company, and he wished to pay also other clients of the solicitor who were entitled to have recourse to the client account.

By this summons, dated April 13, 1951, the trustee in bankruptcy accordingly asked that the bank, at its branch in question, might be at liberty to pay any moneys out of any bank account in the solicitor's name to the trustee in bankruptcy while acting as such.

C. A. Settle for the trustee in bankruptcy. In considering whether to grant the relief asked, the court will have to decide (a) whether the client account vests in the trustee in bankruptcy, and (b) the correct procedure for removing the stop order. On the first point, if the money in the client account is "property held by the bankrupt on trust for any other person" within section 38 (1) of the Bankruptcy Act, 1914,¹ that account will not

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¹ Bankruptcy Act, 1914, s. 38 (1): "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars:—(1) Property held by the bankrupt on trust for any other person."

Trustee Act, 1925, s. 41 (1): "The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in

"substitution for a trustee who is . . . a bankrupt. . . ."

Solicitors Act, 1933, s. 1: "The Council of the Law Society shall make rules (a) as to the opening and keeping by solicitors of accounts at banks for clients' moneys. . . ."

S. 8 (1): "Subject to the provisions of this section, no bank shall, in connexion with any transaction on any account of any solicitor kept with it or with any other bank (other than an account kept by a solicitor as trustee for a specified beneficiary) incur any liability or be under any obligation to make any enquiry or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or

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vest in the trustee in bankruptcy, who will not be able to deal with it. True, du Parcq J. in *Plunkett v. Barclays Bank Ltd.*,² took the view that money assumed to have been paid in under the Solicitors' Accounts Rules, 1935, r. 3, was property so held; but that was not what he was actually deciding in the case, and Harman J. in *Loescher v. Dean*³ took the view that du Parcq J. "did assume"—"assume," not "decide"—"that money in a client account is trust money . . .," and himself added "and so, in a sense, no doubt it is." There is clearly still some uncertainty whether it is trust money or not.

Even if the court holds that the solicitor here is a bankrupt trustee, the position of his trustee in bankruptcy still remains to be clarified. No Act prescribes how to remove a stop order made pursuant to Sch. I, para. 5, to the Solicitors Act, 1941; no Act

"credited to it: Provided that nothing in this subsection shall relieve a bank from any liability or obligation under which it would be apart from this Act."

Subs. (2): "Notwithstanding anything in the preceding subsection, a bank at which a solicitor keeps an account for clients' moneys shall not, in respect of any liability of the solicitor to the bank, not being a liability in connexion with that account, have or obtain any recourse or right, whether by way of set off, counter claim, charge or otherwise, against moneys standing to the credit of that account."

Solicitors Act, 1941, Sch. I, para. 5: "If the Council are satisfied that a solicitor or his clerk or servant has been guilty of any such dishonesty as is mentioned in section two of this Act, they may apply to the High Court or a judge thereof for an order, and the court or a judge thereof may on such application make an order, that no payment shall be made without the leave of the court or a judge thereof by any banker named in the order out of any banking account in the name of such solicitor or his firm."

Solicitors' Accounts Rules, 1945, r. 2 (1): "In these Rules, unless the context otherwise requires—'Solicitor' shall mean a solicitor of the Supreme Court and shall include a firm of solicitors; 'Client' shall

"mean any person on whose account a solicitor holds or receives client's money; 'Client's money' shall mean money held or received by a solicitor on account of a person for whom he is acting in relation to the holding or receipt of such money either as a solicitor or, in connexion with his practice as a solicitor, as agent, bailee, stakeholder or in other capacity. . . ."

R. 3: "Subject to the provisions of rule 9 hereof, every solicitor who holds or receives client's money, or money which under rule 4 hereof he is permitted and elects to pay into a client account, shall without delay pay such money into a client account. Any solicitor may keep one client account or as many such accounts as he thinks fit."

R. 4: "There may be paid into a client account (a) trust money; (b) such money belonging to the solicitor as may be necessary for the purpose of opening or maintaining the account; (c) money to replace any sum which may by mistake or accident have been drawn from the account in contravention of sub-rule (2) of rule 8 of these Rules; and (d) a cheque or draft received by the solicitor, which under rule 5 of these Rules he is entitled to split but which he does not split."

² [1936] 2 K.B. 107, 117.

³ [1950] Ch. 491, 494.

shows what is to be done with the client account of a bankrupt solicitor. In any event, his trustee in bankruptcy must continue to be interested in it, as he is responsible to the creditors. The solicitor can quite easily be removed from his trusteeship of the client account; for, under section 41 (1) of the Trustee Act, 1925, the court has power, where there is no dispute of fact, to displace a trustee against his will and appoint a new trustee in substitution for him: *In re Henderson*.⁴

J. L. Arnold for the creditor company and the solicitor. Whether these are trust moneys, with the result that they do not vest in the trustee in bankruptcy but continue vested in the solicitor, or whether they are not (which is for the court to decide) it is essential that there should be a trustee to deal with them and therefore that, if necessary, one should be appointed. There are four creditors with priority over the creditor company, and the solicitor is willing to sign cheques which will deal with all the money in the account, if the court should so direct.

Nigel S. S. Warren for the Law Society. The money is clearly trust money, notwithstanding that *du Parc* J. was not so deciding with regard to the moneys before him in *Plunkett v. Barclays Bank Ltd.*,⁵ and that *Harman J.* used the words "in a sense" in *Loescher v. Dean*.⁶ Therefore it does not vest in the trustee in bankruptcy, who has no right to it or power to deal with it; nor can it with propriety vest in the solicitor himself. If the court cannot in these proceedings appoint a new trustee, the procedure by originating summons indicated in *In re Henderson*⁷ is appropriate. The Law Society is willing that its own accountant should be appointed.

ROXBURGH J. [after reading the relevant sections of the Solicitors Act, 1933, the Solicitors Act, 1941, and the Solicitors' Accounts Rules, 1945, and stating the facts]:—This summons raises two separate questions. The first is procedural: what is the proper way of getting a stop order removed? But in limine arises the important question: what is the nature of the client account; in other words, what happens to a client account on the bankruptcy of a solicitor? That question, in my judgment, primarily depends on the Solicitors Act, 1933, and on those portions which I have already read, read in conjunction with the Bankruptcy Act of 1914, though I derive some consolation from two dicta to which I will also refer.

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⁴ [1940] Ch. 764.

⁵ [1936] 2 K.B. 107, 117.

⁶ [1950] Ch. 491.

⁷ [1940] Ch. 764.

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[His Lordship read section 38 (1) of the Bankruptcy Act, 1914, and continued:] Section 18, which vests property in the trustee of the bankrupt, provides that on adjudication "the property of the bankrupt shall become divisible among his creditors and "shall vest in a trustee . . ."; but it is to be noted that the only property which vests in the trustee is property divisible amongst his creditors, because section 38 points out what is meant in this Act by "the property of the bankrupt"; accordingly, this client account is not vested, and will not vest, in the trustee if it is property held by the bankrupt on trust for any other person. The words "on trust for any other person," in my judgment, are of very wide import. It is not unusual to find in books and judgments the phrase, "Trustee in the full sense of the term," or some such phrase, but the truth is that, as the principles of equity permeate the complications of modern life, the nature and variety of trusts ever grow, and it is perhaps rash to think of some conception of a trust having certain characteristic attributes, and then to say that a trust which lacks one or more of those characteristic attributes is not a trust in the full sense. In my judgment, the question what are the terms or conditions of a trust has to be answered by reference to the express or, in many cases, implied terms to be derived either from some instrument or from the situation; and I think, as I have just said, that these words are of wide import, in that if it can be said of any asset that though the title is in the bankrupt, a beneficial interest therein resides in some person other than the bankrupt, even though the bankrupt himself may also have a beneficial interest therein, the asset does not vest in the trustee, though the beneficial interest, if any, which the bankrupt himself has would vest in the trustee.

That this is the right approach seems to me to be indicated not only by the nature of the account as indicated by the Solicitors Act, 1933, but by certain dicta which have been made since the Act came into force. *du Parc J.*, in *Plunkett v. Barclays Bank Ltd.*,⁸ said of a sum of money which was assumed to have been paid in under rule 3 of the Solicitors' Accounts Rules, 1935, which corresponds with rule 4 of the Rules of 1945: "It was accordingly "trust money, as is the money recovered by a judgment creditor "in an action which he brings as trustee for another person (see "*Roberts v. Death*"), or the money paid by a stockbroker into "an account into which he pays nothing but moneys received on "behalf of clients: see *Hancock v. Smith*."¹⁰ *Harman J.*, in

⁸ [1936] 2 K.B. 107, 117.

⁹ (1881) 8 Q.B.D. 319.

¹⁰ (1889) 41 Ch.D. 456.

Loescher v. Dean,¹¹ cites that passage and then says: "Therefore, although that was not the point he was deciding, du Parcq J. did assume that the money in a client account is trust money, and so, in a sense, no doubt it is. . . ."

I note, of course, the qualifying words "in a sense" which Harman J. there places on the statement. I think that he was referring to the possibility that the terms of the trust might not be identical with those which characterize what is commonly called a trust in the full sense, but, at any rate, I do not think that there is anything in that qualification which should lead me to suppose that he would have thought that a client account would vest in a trustee in bankruptcy.

My conclusion, therefore, on this part of the case is that a client account constituted in pursuance of section 1 of the Solicitors Act, 1933, or, more accurately, the chose in action represented by such an account, is property held by the bankrupt on trust for another person within the meaning of section 38 (1) of the Bankruptcy Act, 1914, and accordingly does not vest in the trustee in bankruptcy under section 18 of that Act. Therefore, it must remain in the bankrupt until further order.

I am informed by counsel, and believe, that there is no express statutory provision for the removal of the stop order and no express statutory indication what is to happen to the client account in the event of the bankruptcy of a solicitor; that is to say, no express statutory provision for winding up a client account.

In those circumstances, the legal position seems to me to be reasonably clear. Section 41 of the Trustee Act, 1925, as construed by Bennett J. in *In re Henderson*,¹² is available and will provide a satisfactory solution for all the problems, except one, which I will mention to dispose of it. So far as a trustee nominated by the Law Society may be concerned, they apparently do not wish to ask for any remuneration for their nominee. So far as a trustee in bankruptcy is concerned, if he is appointed a trustee, his position is quite different. I think I am right in saying that he is remunerated on a percentage basis and, accordingly, would get no remuneration for any services which he might render as trustee of the client account. That seems to me not to be altogether fair, but I know of no power to give him any remuneration. There is, of course, the procedure in connexion with the appointment of judicial trustees, which might be

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¹¹ [1950] Ch. 491, 494.

¹² [1940] Ch. 764.

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relevant; but I really do not think that that would provide a satisfactory solution. Therefore I have to confess myself unable to deal with that particular problem, namely, the remuneration of the trustee in bankruptcy and of the trustee nominated by the Law Society. I must leave those problems, I think, for future statutory consideration. Apart from those two problems, I find no difficulty, and I am happy to feel that, after a little consideration, a simple procedure can be evolved.

[His Lordship read section 41 of the Trustee Act, 1925, and continued:] That is clear enough and Bennett J. has held in *In re Henderson*¹² that that section enables the court to remove a bankrupt trustee against his will. The trustee was not a bankrupt in *In re Henderson*,¹² but Bennett J. dealt with the case of a bankrupt. Secondly, that case shows that it can be done by originating summons when there is no dispute of fact. There might be a dispute of fact before the bankrupt was adjudicated, but there could hardly be one afterwards, because ex hypothesi, if he has been adjudicated, he is bankrupt.

Without wishing to bind any judge in the future (because it is always, after all, a question who is to be appointed in any particular case), I confess that it seems to me that, other things being equal, the court would be inclined to appoint two trustees—it seldom appoints only one—and would be inclined to appoint, if it was convenient, the nominee of the Law Society, because they, under the Solicitors Act, 1941, administer a compensation fund which is available for compensating what I might call the professional creditors of the solicitors, but not their domestic creditors, as I might call them. Accordingly, they have a very strong duty to their own members to do their best to see that funds which ought to be applied in paying professional creditors are not applied in paying domestic creditors. Thus, they have a great interest in the matter, and it seems to me that there is very good ground, other things being equal, for appointing their nominee.

On the other hand, a trustee in bankruptcy has also an interest. It is his duty to try to get as much as he can for the general creditors and therefore in that capacity he represents the other point of view. Moreover, he will have all the books of the bankrupt and obviously will be in a very good position to investigate the situation. Therefore, it seems to me there is a great deal to be said, other things being equal, for the appointment of the

¹² [1940] Ch. 764.

nominee of the Law Society and the trustee in bankruptcy as trustees.

That being so, I think a very simple form of procedure is available. The summons should be intituled not only "In the matter of the Solicitors Act" but also "In the matter of the Trustee Act." It will be in the form which is not inter partes, but which does require entry of appearance, and it will ask in separate paragraphs for a stop order—I am using that short phrase to describe that which is obtainable under para. 5 of Sch. I to the Act of 1941—and for the appointment of whomever they like to nominate as trustees. It is almost certain that, if it is a case in which a stop order is justified, it will be one in which the removal of the solicitor from the trusteeship of the fund will also be justified, and so there will be no difficulty in or objection to asking for both forms of relief, even though the bankruptcy may not have actually occurred. Then the existing procedure will be followed.

The summons will come in the first instance before the master ex parte and he will, if it is a proper case for making an order, make an order in the form now before me which is dated January 22, 1951. It is: "Upon the application of the Law Society by originating summons . . . it is ordered that no payment be made until [a date specified in the order] without the leave of this court or of a judge thereof by the bank out of any banking account in the name of [the solicitor]. And it is ordered that the said originating summons be heard [on a date specified] before the master and that the order"—that is to say the interim ex parte stop order—"be served forthwith [on the solicitor] together with the originating summons." When that comes again before the master, the solicitor may have been adjudicated bankrupt, or he may not. If he has not, then, if it is a case for making the stop order, the stop order will be made, and the other matter will stand over. But if he had by then already been adjudicated bankrupt, there is no reason why the stop should not then be removed simultaneously with the appointment of the trustees in his place. I suppose a vesting order would be made on the appointment of the trustees, which would presumably vest the account in the trustees. As far as I can see, that procedure will work.

So far as I am concerned, at any rate, there will be no need for the Law Society to produce an affidavit of the fitness of the person whom they have nominated, being an officer in their

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employment, and, so far as the trustee in bankruptcy is concerned, there will be no necessity for an affidavit of fitness because he already gives security as a trustee in bankruptcy.

There is one further matter with which I must deal. *Prima facie* the Law Society would not be a person who could make application under section 41 of the Trustee Act, 1925. If, however, the Law Society make a token payment, say of £1, out of their compensation fund to a professional creditor of the solicitor, being a person interested in the client account, then, on such payment, they become, under section 2 (8) of the Act of 1941, subrogated to the rights of that professional creditor against the client account and thus would, in my judgment, be a person or persons beneficially interested in that account and therefore a person or persons able to make an application under section 41.

In this particular case I am able to short circuit this procedure because the bankrupt has most fortunately appeared by counsel and is willing to undertake to sign cheques which will exhaust the client account. That fund, as is shown by the evidence, belongs to five persons. Mr. Arnold admits that the other four must have priority to the creditor company. I have before me all the necessary parties, the trustee in bankruptcy, who protects the general body of creditors, the Law Society, and the creditor company and the solicitor. The only persons I have not before me are the four who are admitted to take precedence. The bankrupt, in pursuance of his undertaking, will draw a cheque for the respective amounts of the four creditors. Then he will draw a cheque for the whole of the balance available, subject to costs, in favour of the creditor company, and I will remove the stop order so far as is necessary to enable the bank to honour those cheques so drawn, which will in fact exhaust the whole fund. The bank, however, will have notice of that and, of course, will not honour any other cheques, if perchance any other cheques should be drawn.

Order accordingly.

Solicitors: *Kinch & Richardson, for Percy Hughes & Roberts, Birkenhead; Hempsons.*

K. R. A. H.

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[1950 R. 433]

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Costs—Solicitor and client costs of successful plaintiff—Construction of rule—Duty of taxing master when taxing costs—Solicitor litigant acting for self—Costs of instructing, consulting or attending on London agent—R.S.C. Ord. 65, r. 27 (29).

Order 65, r. 27 (29) provides: "On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special fees to witnesses or other persons, or by other unusual expenses."

The duty of a taxing master is to approach both party and party and solicitor and client taxation with his mind on sub-rule 29, which is his proper norm or standard; but, at the same time, he is to make more generous allowances in taxing as between solicitor and client because, though the sub-rule prevents him from fully achieving the intention to allow all that a solicitor can properly claim against a client, it is his duty to carry out that intention as far as permissible.

Andrews v. Barnes (1887) 39 Ch.D. 133, *Giles v. Randall* [1915] 1 K.B. 290, *Frankenburg v. Famous Lasky Film Service Ltd.* [1931] 1 Ch. 428, 436, *per* Lord Hanworth M.R., and *Goodwin v. Storrar* [1947] K.B. 457 considered.

A country solicitor litigant "who is acting for himself in a London case is not prevented by law from consulting or from instructing or from attending on his London agent and being allowed the costs of so doing.

London Scottish Benefit Society v. Chorley (1884) 13 Q.B.D. 872 considered and distinguished.

On taxation, a female witness who has been taken away from her domestic duties is entitled to a proper witness fee, and there is no justification for disallowing any fee, or anything but a nominal fee, merely because she does not carry on a gainful occupation separate from her husband.

SUMMONS to review taxation.

The plaintiff, a north country solicitor, brought an action for specific performance of a contract dated November 8, 1949, and made between the defendant and the plaintiff for sale by the defendant to the plaintiff of certain property for £1,600.

The defence as pleaded was that the purported contract was not a genuine or real sale by auction, but was the outcome of a

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conspiracy by the plaintiff, the auctioneer and two others to bring about the sale by the defendant of his premises much below their true value, and that, in the circumstances, the contract was void or, alternatively, was not one of which the court ought to grant specific performance. The defence collapsed and Roxburgh J., taking the view, on the authority of *Andrews v. Barnes*,¹ that he could, and in the circumstances ought, to award solicitor and client costs, ordered that there be referred to the taxing master, to tax as between solicitor and client, the costs of the plaintiff of the action, other than certain costs.

The plaintiff's London agents lodged a bill of costs claiming £471 8s. 6d. From it the taxing master disallowed £293 4s. 8d., leaving the sum allowed as £178 3s. 10d. To that, 50 per cent. was added, making £267 5s. 9d.; to that, the disbursements, amounting to £542 7s., making £809 12s. 9d., and to that the taxing fee of £20 5s., making £829 17s. 9d.

The plaintiff carried in 16 specific objections against particular disallowances and the taxing master made his answers to the objections. The objections and answers, so far as material to this report, are set out in the arguments and in the judgment of Roxburgh J.

The plaintiff took out this summons to review taxation.

Charles Russell K.C. and *Maurice Berkeley* for the plaintiff. Taxation of all the items ought to be reviewed. The plaintiff's objections included the following: "General objection. Because "the disallowances fail to reflect (a) the principle that party and "party costs are intended as a full indemnity for all costs reasonably incurred in an action; (b) the principle that solicitor and "client costs are intended to embrace a more generous allowance "for the actual costs, which have been incurred by the party; " (c) the facts that Roxburgh J. made the special order for "solicitor and client taxation expressly on the ground that the "case was 'a very exceptional and rare case that contained a " 'wholly unjustified allegation of fraudulent conduct against two " 'professional men and one business man,' and that he considered that it (the defence) should never have been put "forward, let alone persisted in; (d) the fact that it was vital to "the plaintiff not merely to obtain an order for specific performance but in the course of it to ensure that grave charges should "be shown to be wholly unjustified."

¹ (1887) 39 Ch.D. 133.

The taxing master prefaced his answers to the objections with the following observation: "This is a solicitor and client taxation where costs are payable by one party to another and is substantially little more than a party and party taxation except that any necessary letters to and attendances upon the client are allowed: *Giles v. Randall*."² That, in fact, is just what the taxing master has done. He has produced a purely party and party taxation, for the plaintiff is on the record and therefore could not charge for "letters to" himself and "attendances on" himself; cf. *per* Brett M.R. in *London Scottish Benefit Society v. Chorley*.³

The taxing master took the view that the plaintiff ought to have the benefit of the less advantageous scale. Your Lordship's order, however (which was that the costs of the plaintiff, other than certain specified costs, be referred to the taxing master to tax as between solicitor and client) ought to be construed as if it had been worded "to tax as between solicitor and own client." True, that means an indemnity: but the order was made in reliance on *Andrews v. Barnes*,⁴ where both Kay J. and the Court of Appeal intended to indemnify other parties and were awarding costs on the footing of giving an indemnity. It is proper that your Lordship's order should be construed as having so awarded them in this case. It would have been useless merely to show that the defendant's allegations against the plaintiff were not satisfactorily established. What had to be shown was that there was no reflection whatever on the plaintiff; that in fact was shown by the defendant's withdrawal of his defence, which constitutes a very important background to the case.

The natural meaning of "solicitor and client costs" is "the costs which a client will have to pay to his own solicitor." Its technical meaning is "the costs to be paid to the solicitor out of a common fund in which the client and others are interested." The taxation there is substantially as between party and party but on a more generous scale: *Goodwin v. Storrar*.⁵ In that case, Denning J. took the view that the natural meaning, which he called "meaning A," had been used in Ord. 22, r. 14 (11)—a modern rule of court not relevant to the present case—and that it was therefore, as well as the natural meaning, a valid technical meaning which should ordinarily be given in a legal document.

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² [1915] 1 K.B. 290.

³ (1884) 13 Q.B.D. 872.

⁴ 39 Ch.D. 133.

⁵ [1947] K.B. 457.

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In *Giles v. Randall*,⁶ Buckley L.J. said that "taxation of "costs as between solicitor and client" was "substantially a "party and party taxation on a more generous scale" and that in taxation of costs "as between solicitor and own client" there was "an ascertainment and allowance of the charges properly "payable by the client to his solicitor."

[ROXBURGH J. That decided merely that "solicitor and "client" is narrower than "solicitor and own client." It does not warrant the exordium of the taxing master in the present case.]

Precisely: and it is clear that he has not exercised his discretion on correct principles. Thus, he reduced a fee of £2 4s. 6d. to counsel (item 3) to £1 3s. 6d., a part of counsel's fee to settle affidavit from £3 5s. 6d. to £2 4s. 6d. and part of counsel's fee for drawing particulars from £2 4s. 6d. to £1 3s. 6d. Objections were made to all these disallowances, which represented wholly inadequate fees even on party and party taxation. The taxing master, however, considered what he had allowed fair and adequate, and therefore overruled the objections.

He disallowed altogether the plaintiff's expenses for coming to London for consultation, on the ground that he considered it entirely unnecessary because "the full facts were before junior "counsel or should have been for his advice on evidence already "allowed, and any supplemental instructions . . . could have "been laid before counsel in writing." He did not apply sub-rule (29), either expressly or by implication: and he ought to have done so; and he added: "This is essentially, in my opinion, a "solicitor and own client item."

Items which were all for small amounts were items 2 (instructions to sue), 5 (instructions for statement of claim), 5a (instructions for particulars) and 7 (instructions for affidavit of documents). He disallowed them entirely and was in error in so doing. Where a solicitor plaintiff acts through his London agents on the record, the defendant should be liable for the same costs as he would be liable for if the solicitor plaintiff had instructed those London agents to act as his solicitors on their own account: *London Scottish Benefit Society v. Chorley*.⁷ Here, the solicitor plaintiff, for all practical purposes, put himself in the hands of his London agents, Ward, Bowie and Co.

Item 12, "instructions for brief," the taxing master reduced from 350 to 80 guineas. This was objected to as far too small a

⁶ [1915] 1 K.B. 290, 295.

⁷ 13 Q.B.D. 872.

sum. Very serious charges were made against the plaintiff, who had to be vindicated, not only by winning the action, but by continuing in his high reputation with his clients. In this item "London agents" were described as having "had the conduct" of the action: and against the word conduct there was written, in the taxing master's office: "q.," i.e., "query," "but this is an agency case, the principal being also the plaintiff." Also, against the words "instructions for brief," were written the words "fee in lieu of," apparently indicating the view that a solicitor plaintiff cannot "instruct" his London agents. That is quite misconceived, as also is the view, likewise written against the item, that the plaintiff "cannot charge for perusing own correspondence." The court ought to be told what was said before the taxing master about item 12.

[ROXBURGH J. I think that, strictly, I must go on what is already before me and on that only.]

Item 13, "part of Burnicle, Appleby and Hope's charges, "reduced from £33 13s. 9d. to 10 guineas," is concerned with Mr. Young, the auctioneer in the case. The plaintiff had to call him and obtain a proof of his evidence and it was quite reasonable of Mr. Young to desire the advice of his own solicitors and to require the plaintiff to pay their costs. The taxing master, however, would not entertain these considerations and expressed the view that the plaintiff's proper course was to subpoena Mr. Young, which clearly was not so.

Items 15 and 16 relate to Mrs. Reed's witness fee, disallowed by the taxing master at nil. The amount is small, but the principle involved is important. Originally, the amount put in was £3 3s. 0d. a day for the four days and the taxing master struck out the whole amount. Then he said that he would allow 10s., but, when it was pointed out to him that that was only half a crown a day, he allowed £1. To that the objection was raised, among others, that she was entitled to a witness fee because she had to be away from her domestic work; that that fee ought not to be disallowed merely because she was not gainfully occupied separately from her husband; and that even the old table of witnesses' fees provided for fees for "gentlemen" and for "females according to their station in life." The taxing master, however, kept to the ground that she followed no gainful occupation separate from her husband, and he therefore still allowed only the nominal sum of £1, "as he had already allowed her expenses under another item." That cannot be correct. A woman who has had to leave domestic

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duties to attend court as a witness is entitled to a proper fee for being a witness: and the fact that she has no gainful occupation separate from her husband is irrelevant.

F. B. Alcock for the defendant. In *Giles v. Randall*,⁸ Buckley L.J. quoted from the taxing master's answer the sentence: "... the taxation in the case of No. 3 [i.e., where the " costs are payable out of a fund which belongs to others and in " which the party has no interest or where the costs are payable " by one party to another] which is the one that applies to this " action, is the strictest and in effect gives little more than a taxa- " tion as between party and party, except that any necessary " letters to and attendances on the client are allowed." Buckley L.J. then said: " That is not very well expressed. ' Necessary " ' letters to and attendances on the client ' are allowed as between " party and party; the letters and attendances there referred to " must be letters and attendances beyond those that would be " allowed as between party and party." That is the only criticism which Buckley L.J. made of that paragraph in the taxing master's answer: and it does not follow from Buckley L.J.'s having used the words " not very well expressed " that the taxing master misdirected himself, or that Buckley L.J. disapproved of the paragraph in other respects.

Unless the whole taxation is erroneous in principle, only those items which have been improperly disallowed ought to be sent back for review. Rule 27 (29) confronts the taxing master with the questions (a) whether he ought to allow anything at all and (b) if he ought to, how much he ought to allow. It is for him to decide whether each item is necessary or proper. True, he ought not to have disallowed the item " instructions to sue." The fact that a solicitor litigant cannot charge for " consulting " or " instructing " or " attending upon " himself does not prevent him, in an agency case, from " consulting " or " instructing " or " attending on " his London agent.

Charles Russell K.C. in reply. Your Lordship has already been asked to hold that the order which you made ought to be construed as having directed a solicitor and own client taxation. In *Frankenburg v. Famous Lasky Film Service Ltd.*,⁹ Lord Hanworth M.R. said: "... the difference between party and party " and solicitor and client costs is undoubtedly this, that the " solicitor and client costs are intended to embrace a more " generous allowance for the actual costs which have been incurred

⁸ [1915] 1 K.B. 290, 296.

⁹ [1931] 1 Ch. 428, 436.

"by the plaintiff." Your Lordship is now asked to go further than that.

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ROXBURGH J. Having regard to all the circumstances, I thought that, in the exercise of the discretion which I considered myself to have on the authority of *Andrews v. Barnes*,¹⁰ I ought to award the plaintiff costs as between solicitor and client, and accordingly I made, on November 16, 1950, an order that there be referred to the taxing master to tax as between solicitor and client the costs of the plaintiff of this action other than certain costs, to which I need not further refer.

What is the true construction of that order? On this point *Giles v. Randall*¹¹ is the leading case and Ord. 65, r. 27 (29), the relevant sub-rule. [His Lordship read it and continued:] In *Giles v. Randall*¹¹ the facts are as follows: "The plaintiff brought an action against the defendant to recover damages for breach of promise of marriage. When the case was in the day's list for hearing terms were agreed and indorsed on counsel's briefs 'that judgment should be entered for the plaintiff for £500 with costs as between solicitor and client to be taxed (if necessary),' and accordingly the judgment as drawn up stated that 'it is adjudged that the plaintiff recover against the defendant £500 and her costs as between solicitor and client to be taxed (if necessary).' The plaintiff's bill of costs was accordingly taxed, and the taxing master disallowed or reduced in amount a large number of items therein, such as the charges for instructions for briefs and counsel's fees. The plaintiff carried in objections to the disallowances before the taxing master, which, so far as material, were as follows: 'The plaintiff objects generally to the taxation and to the disallowance of the items hereinafter mentioned on the grounds: (1) Such taxation was conducted upon the basis of a party and party taxation. (2) It ought to have been conducted upon the basis of a taxation as between solicitor and client where the costs are to be paid by the client, because the terms of settlement of the action were that the plaintiff was to receive £500 damages clear, and all the costs for which she was liable to her solicitor were to be paid by the defendant.' The taxing master in his answer thereto (so far as material) said: 'It is well settled that there are various forms of taxation as between solicitor and client. No. 1. Where the costs are payable by

¹⁰ 39 Ch.D. 133.

¹¹ [1915] 1 K.B. 290.

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“ the client to his solicitor or where the costs are payable out
“ of a fund belonging entirely to the party. No. 2. Where the
“ costs are payable out of a general or common fund. No. 3.
“ Where the costs are payable out of a fund which belongs to
“ other parties and in which the party has no interest or where
“ the costs are payable by one party to another. The taxation
“ in the case of No. 3, which is the one that applies to this
“ action, is the strictest and in effect gives little more than a
“ taxation as between party and party, except that any necessary
“ letters to and attendances on the client are allowed.”

Those words, which are derived from the taxing master's answers to objections and not from any judgment of any member of the court, are the linch-pin of the case which I am now trying, and it is to be observed that they do not purport to set out a norm or standard for a taxation, but to state in summary form the result of a taxation on what the taxing master calls a No. 3 basis. I desire to stress that. I cannot believe that the taxing master in that case was ignorant of sub-rule (29), or failed to realize that that was the sub-rule which supplied the norm or standard for taxations as between solicitor and client. I think he was merely stating what in his experience was the general effect of a taxation so conducted. It is to be noted that he used the words “ in effect ” and does not say “ gives no more “ than ”; he says “ gives little more than.”

Buckley L.J. adopts the classification into three classes indicated by the taxing master. He then says¹²: “ A practice “ has grown up, which I must say I regret, of differentiating “ between taxation of costs as between solicitor and client and “ as between solicitor and own client. In the former case the “ taxation is substantially a party and party taxation on a more “ generous scale. In the latter case there is an ascertainment “ and allowance of the charges properly payable by the client to “ his solicitor. That distinction is too firmly established for this “ court to interfere with it, though it may be a matter proper to “ be considered by the Rule Committee. I have no doubt that “ litigants who stipulate for and by agreement are to receive costs “ as between solicitor and client often intend to get an indemnity “ in respect of costs. The taxing master has taxed the costs “ upon the footing that the latter part of rule 27 (29) of Ord. 65 “ applies.”

I desire to stress that. It reinforces my conclusion that the taxing master knew perfectly well that it was that sub-rule which

¹² [1915] 1 K.B. 290, 295.

supplied the norm or standard for taxation and that the particular paragraph, to which I have referred, was not intended by him to be substituted for the norm or standard but was intended to state a broad summary of the results as he had experienced them.

Buckley L.J. then discusses the sub-rule and then says¹³:
 “The latter part”—that is the latter part of the sub-rule—
 “says that, except in one particular case, certain costs which
 “were formerly to be disallowed are still to be disallowed. The
 “excepted case is that of taxation of costs as between a solicitor
 “and his own client. This part of the sub-rule in effect provides
 “that as between solicitor and own client those costs may be
 “allowed, but that in all other cases they shall not. The other
 “cases include taxation as between solicitor and client as distin-
 “guished from taxation as between solicitor and own client.
 “Accordingly upon such a taxation as this the costs described
 “in the latter part of sub-rule (29) are not to be allowed. The
 “taxing master in this case has proceeded upon that footing. He
 “says that ‘the taxation in the case of No. 3, which is the one
 “that applies to this action, is the strictest and in effect gives
 “‘little more than a taxation as between party and party, except
 “‘that any necessary letters to and attendances on the client
 “‘are allowed.’ That is not very well expressed. ‘Necessary
 “‘letters to and attendances on the client’ are allowed as
 “between party and party; the letters and attendances there
 “referred to must be letters and attendances beyond those that
 “would be allowed as between party and party. The taxing
 “master has taxed this bill of costs on the footing that the latter
 “part of sub-rule (29) applies. For the reasons I have given I
 “think that he was right. Except upon a taxation as between
 “solicitor and own client such costs as there mentioned are not
 “to be allowed. That is the only question of principle argued
 “before us.”

Pickford L.J. agrees. He says that he regrets that he feels bound to affirm the decision. He says that logically costs as between solicitor and client can mean only one thing, namely, such costs as are properly chargeable between a solicitor and his client and are properly payable by the client to his solicitor, but he agrees that the sub-rule does apply to a solicitor and client taxation. He makes no reference at all to the particular paragraph in the taxing master's answers to which I have referred.

That case, in my judgment, decided one thing quite clearly, namely, that the latter part of the sub-rule applied to a solicitor

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¹³ [1915] 1 K.B. 290, 296.

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and client taxation with the inevitable corollary that a solicitor and client taxation cannot be made identical with a solicitor and own client taxation. In my judgment, it plainly decided that; but, equally plainly, it decided nothing else.

Mr. Alcock, in an able argument, suggested that, as Buckley L.J. referred to the particular paragraph in the taxing master's answer, and criticized it in one respect only, I ought to infer that he impliedly approved it in all other respects. First, however, I do not think that it was ever intended to be a pronouncement of a norm or standard; secondly, I do not think that Buckley L.J. did approve it in all other respects, because it is not really consistent with what he himself has said. What he said was that in the former case, that is to say the solicitor and client taxation, the taxation is substantially a party and party taxation on a more generous scale. That must be so because the whole of sub-rule (29) applies equally to both a party and party taxation and to a solicitor and client taxation.

Therefore, the characteristics of the items which can properly be allowed must be the same in both classes of taxation. Accordingly, the only scope for difference is that the allowances should be on a more generous scale in one class of taxation than in another. But there is, in my judgment, no ground for thinking that Buckley L.J. thought that the only things that could be treated more generously were certain letters and attendances to the exclusion, for example, of counsel's fees. There seems to me to be no reason at all for thinking that Buckley L.J. thought that, and no way of reconciling such a view with his own general statement of the position which I have just read.

Take, for example, item 4 in the present case: "March 2, 1950. Part of counsel's fee to settle affidavit in support of application under Order 14A. Fee claimed £3 5s. 6d. Fee allowed £2 4s. 6d." There is no doubt that the fee claimed was within the permissible category whether the taxation was on a party and party or on a solicitor and client basis. If the principle of a solicitor and client taxation is that more generous allowances should be given than in the case of a party and party taxation, why should that principle not extend to this particular item? According to Buckley L.J., it does. Accordingly, if £2 4s. 6d. was what would have been allowed on a party and party basis—I do not know; that is merely a hypothesis—it may well be that £3 5s. 6d. is what would be allowed on a solicitor and client basis. I am not saying it would; I am saying it may well be.

I wish to point out the difference. If Buckley L.J.'s definition is accepted, that is the position; but if the particular passage of the taxing master's answer in *Giles v. Randall*¹⁴ is accepted, that is not the position, because this is not an attendance or a letter and, therefore, there would be substantially no difference, according to that view, on this item, between a party and party taxation and a solicitor and client taxation. I do not think that Buckley L.J. intended, by his reference to this particular passage and his criticism of it in one respect only, to imply that it was to be read as a limitation on the generality of his own phrase, which is "that a solicitor and client taxation is substantially a party and party taxation on a more generous scale."

If, contrary to my view, Buckley L.J. did intend to make that implication, it was plainly obiter dictum. He himself says that the only point of principle decided in the case was whether or not the sub-rule applied to a solicitor and client taxation. This point had no relevance to the decision of that point of principle and Pickford L.J. does not refer to the particular passage at all. Therefore, I am not prepared to accept the view that those words have been put forward by the taxing master in that case or by the court as a norm or standard for a solicitor and client taxation.

In my judgment, the duty of a taxing master is to approach both classes of taxation, both the party and party and the solicitor and client taxation, with his mind on the sub-rule, which is his proper norm or standard; but, at the same time, he is to make more generous allowances in taxing as between a solicitor and client because, though the sub-rule prevents him from fully achieving the intention clearly expressed by the direction in the order, that is to say, to allow all that a solicitor can properly claim against a client, it is his duty to carry out that intention so far as permissible.

In his reply Mr. Russell referred me to a passage in *Frankenburg v. Famous Lasky Film Service Ltd.*,¹⁵ which appears to me to embody the same principle. Lord Hanworth M.R. said: "The difference between party and party and solicitor and client costs is undoubtedly this, that the solicitor and client costs are intended to embrace a more generous allowance for the actual costs which have been incurred by the plaintiff."

Mr. Russell asks me to go further and to hold that in this particular case the order should be construed as though it had directed a solicitor and own client taxation; or, in other words,

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¹⁴ [1915] 1 K.B. 290.

¹⁵ [1931] 1 Ch. 428, 436.

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an indemnity. He says that because *Andrews v. Barnes*¹⁶ was the case on which I relied as giving me jurisdiction to make the order which I made. It is undeniably true that the judgment of the court refers to "the right of the applicant to indemnity, the "reason assigned by Kay J. for awarding them in the present "case." I cannot, however, accept Mr. Russell's submission.

I must be careful not to state the one thing which I could plainly state, namely, what was in my mind when I made the order, because I remember quite well. I am entitled, however, to recall what I did then say, which was: "Mr. Russell, on "behalf of the plaintiff, asked me to make an order for costs "as between solicitor and client." I note that he did not ask me to make an order for costs as between solicitor and own client, or to make an order for costs which would give him an indemnity. I then said: "At first I was in some doubt "as to whether I had any jurisdiction so to do." That means to give him an order for costs as between solicitor and client. There can be no doubt, I think, about that. I then said: "It "does seem to me that I have jurisdiction to make the order." What does that mean—an order for costs as between solicitor and client—and I gave as my reason *Andrews v. Barnes*.¹⁷ I then said: "I therefore conclude, as a matter of law, that I have "jurisdiction. Ought I to exercise it?" That means ought I to make an order for solicitor and client costs? I gave reasons for thinking that I should. I was asked to make an order for solicitor and client costs. I made one. Why should it be presumed that I intended to make an order which, in this respect, should have a different operation from the numerous orders for taxation as between solicitor and client which I have made during a comparatively short sojourn on the Bench? In my judgment, this order is not to be construed differently from any other order for solicitor and client costs merely because I thought I found my jurisdiction to make it in *Andrews v. Barnes*.¹⁷

Mr. Russell then approached his problem on broader grounds. He said that *Goodwin v. Storrar*¹⁸ is an authority for the proposition that an order for solicitor and client costs ought now to be construed as though it were an order for solicitor and own client costs. There is no doubt that *Goodwin v. Storrar*¹⁸ has not previously been taken into account in carrying out taxations as between solicitor and client in the Chancery

¹⁶ 39 Ch.D. 133, 140.

¹⁷ 39 Ch.D. 133.

¹⁸ [1947] K.B. 457.

Division and I must look at it carefully. It is a decision of Denning J. The facts are as follows: "The plaintiffs were "personal representatives of a man and his wife who were killed "as a result of an explosion at a munition works, and they "brought an action against the defendant claiming damages under "the Law Reform (Miscellaneous Provisions) Act, 1934, and a "sum under the Fatal Accidents Act for the benefit of the two "children of the deceased. The action was settled on the terms "that £250 was to be paid in respect of each of the deceased "under the Law Reform (Miscellaneous Provisions) Act, 1934, "and £1,750 under the Fatal Accidents Act. The settlement "was embodied in a consent order approved by the court, which "contained the following provision as to costs: 'The defendant "pays to the plaintiffs' solicitors the costs of this action as "between solicitor and client to be taxed such costs to include "the costs properly incurred before the issue of the writ and "in relation to the subject-matter of the action.' On taxation, "the taxing master taxed the costs on the basis that under "Ord. 22, r. 14, sub-r. 11 (1), the plaintiffs' solicitors were "entitled to be paid such costs as they would be properly entitled "to receive from their own clients. The defendant applied for "a review."

Denning J. said ¹⁹: "The words 'taxation as between "solicitor and client' have two meanings. The natural and "ordinary meaning, which I will refer to as meaning A, is an "inquiry as to the costs which a client ought properly to pay to "his own solicitor, as distinct from 'taxation as between party "and party,' which is an inquiry as to the costs which he should "recover from the opposite side. The distinction is based on "common sense. . . . The other meaning of 'taxation as "between solicitor and client,' a technical meaning, which I "will refer to as meaning B, is an inquiry as to the costs to be "paid to the solicitor out of a common fund in which the client "and others are interested and is substantially a taxation as "between party and party, but on a more generous scale. When "meaning B is used, a different form of words is needed to "describe an inquiry as to the costs which a client ought properly "to pay to his own solicitor, and that is then described as a "taxation as between solicitor and own client."

Denning J. continued ²⁰: "In my opinion, in Ord. 22, r. 14 "(11), the words are used in meaning 'A.'" Of course, with

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¹⁹ [1947] K.B. 457, 458.

²⁰ Ibid. 459.

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regard to that, I am not concerned, because this case has no relation to Ord. 22, r. 14. But he then continues: "If I am right in thinking that in the sub-rule [Ord. 22, r. 14 (11).] the words are used in meaning A, it shows that it is a valid meaning to be attached to them in any legal document, and this enables me to distinguish *Giles v. Randall*.²¹ The court in that case recognized that meaning A was the natural and ordinary meaning but felt compelled to give the words meaning B because that was the technical meaning; and in a legal document, where words have a technical meaning, it is the technical meaning which should be received. Now that a rule of the Supreme Court has been made using the words in meaning A, it follows that meaning A at the present day is not only the natural and ordinary meaning, but also a valid technical meaning, and that there is no reason why in a legal document that meaning should not be ordinarily given. In the order as to costs in the present case, therefore, there is no reason why I should not adopt meaning A, when that appears to be the meaning intended by the parties, as I think it is. In view of this development it may be that *Giles v. Randall* ²¹ would be differently decided at the present day."

As I said just now, Ord. 22, r. 14, has no application to this action, but Ord. 65, r. 27 (29), has and still stands. *Giles v. Randall* ²¹ decided that that sub-rule applies to my order, for, indeed, there is no ground of distinction known to me, other than that with which I have already dealt, between the order in *Giles v. Randall* ²¹ and the present order.

Accordingly, my order cannot be construed as directing a solicitor and own client taxation because so to construe it would be to hold that the sub-rule did not apply to it. But I do find in Denning J.'s decision support for what I have already said about the duty of a taxing master in a solicitor and client taxation.

One other point of general principle emerges in the present case. The plaintiff, being, as I have already said, a solicitor, acted for himself in these proceedings, but, as is natural seeing that he practises in Sunderland and that the action was tried in London, he employed London agents to conduct it.

In *London Scottish Benefit Society v. Chorley*,²² the court had to consider the right of a solicitor who acts for himself in litigation to recover costs against an adverse party, and there was no question of agency in that case. Brett M.R. said: "The

²¹ [1915] 1 K.B. 290.

²² 13 Q.B.D. 872, 876.

" unsuccessful adversary of a solicitor appearing in person cannot
 " be charged for what does not exist, he cannot be charged for
 " the solicitor consulting himself, or instructing himself, or
 " attending upon himself. The true rule seems to be that when
 " a solicitor brings or defends an action in person, he is entitled
 " to the same costs as an ordinary litigant appearing in person,
 " subject to this restriction, that no costs which are really
 " unnecessary can be recovered. Of this kind are the costs of
 " instructions and attendances."

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I read those words " costs of instructions and attendances " as referring to the previous sentence, " costs of instructing himself or attending upon himself." I am sure that in making those observations the court was not considering at all what might be the position between a solicitor and a London agent.

In the present case the taxing master has construed that passage in this way. He says: " It is the settled law and practice " that a solicitor litigant acting for himself is entitled to all costs " of conducting the litigation to which he is a party, as if he had " employed another solicitor to act for him, except that he is not " entitled to such items as ' instructions from ' and ' attendances " ' upon ' himself, or perusal of his own documents." So far there is no question; but then he continues: " In this case I find " as a fact that the plaintiff instructed Ward, Bowie & Co. as his " London agents "—that is undoubtedly correct—" and they as " London agents are in the same position for the purpose of this " objection as the plaintiff himself, neither more nor less."

Mr. Alcock in fact conceded that that deduction was not permissible, and rightly so. The reason why Brett M.R. said that a solicitor could not charge for consulting himself, or instructing himself, or attending upon himself, was because such things did not exist, and that reason has no application to a case of a solicitor consulting a London agent, or instructing a London agent, or attending on a London agent. I agree with counsel's admission that there is no impossibility in law in a solicitor doing such things and being allowed costs in respect thereof.

I now come to the facts of the present case. [His Lordship stated them, read the plaintiff's general objection, and continued.]

Summa ars est celare artem. The real gravamen of the objection is under sub-head (b) and I have no doubt that the taxing master realized that because, though his answer is not specifically directed to any one of the four sub-heads, it does fit in very neatly as an answer to (b). He says: " This is a solicitor and client

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“taxation where costs are payable by one party to another and is substantially little more than a party and party taxation except that any necessary letters to and attendances upon the client are allowed.” (*Giles v. Randall*.²³)

I have already given my reasons for thinking that *Giles v. Randall*²³ does not support that proposition, derived as it was from the taxing master's answers in that case, as a norm or standard for the taxation of costs as between solicitor and client; on the contrary, sub-head (b), to which it appears to be an answer, does, as it seems to me, embody the true principle which I have endeavoured earlier to state.

Where, then, am I? The plaintiff was saying that the allowances were not sufficiently generous and, in support of that contention, inserted sub-head (b). The taxing master's answer must, therefore, be regarded by him as pointing to a less generous scale. That conclusion seems to me irresistible. It seems to me plain from what the taxing master has himself said that he did adopt a norm or standard of taxation less generous than that indicated under letter (b) and, if so, then in my judgment that must vitiate all his decisions on all items affected by the general principle.

Mr. Alcock said that that was not so, and that his detailed decisions were all questions of quantum. I do not agree. The question is not the quantum, but from what point of view the ascertainment of the quantum is approached: if it be approached from a wrong point of view, the quantum must necessarily be vitiated; though further than that it is impossible to go. It is impossible to say by how much the quantum is vitiated.

Not only is it, in my judgment, inherent in the taxing master's own answer to that general objection that he has approached the taxation from a wrong point of view, but when I come to some of the material items, I see it established at once. Take, for instance, No. 3 of February 14, 1950, part of counsel's fee to settle writ. The sum claimed was £2 4s. 6d. and the amount allowed £1 3s. 6d. This is an item, again, which would be allowed, whether the taxation is party and party or solicitor and client. I imagine that it is impossible for a taxing master to allow less than £1 3s. 6d. because that is, and will be for a few days still, counsel's minimum fee. Accordingly, if he is to allow anything, he cannot allow less than £1 3s. 6d. and, therefore, I must assume that that is the application of the party and party

²³ [1915] 1 K.B. 290.

system of taxation to that item. If the taxing master's proposition is accepted, the item would be the same on a solicitor and client taxation because it is neither a letter nor an attendance and, therefore, presumably, he would say as regards this item: "It must be the same whether the taxation is party and party or solicitor and client." That is not so if the proposition which was advanced under sub-head (b) by the objectors, and which has found favour with me, is correct. The taxing master would not be bound to allow £2 4s. 6d. on a solicitor and client taxation, but he plainly could do so. Hence at once appears the difference in result between the two principles.

Precisely the same can be said of item 4, to which I have earlier referred, and item 6, to which I need not refer in detail.

Then, again, take item 14, which is not quite in *pari materia*, but is certainly surprising. This was a claim for £14 18s. 10d. for the plaintiff's expenses in coming to London for a consultation on July 24, 1950. The plaintiff was a cripple, but I am not here concerned with any question of quantum because the taxing master totally disallowed this item. I must say that that does somewhat surprise me, though I realize that there I am outside my province; but this I would point out that the proper test which the taxing master ought to have applied to that item was sub-rule (29). He ought, first of all, to have considered whether it was necessary or proper, and, if he arrived at the conclusion that it was neither necessary nor proper, then, of course, he was right in disallowing it and that would have been an end of the matter. But if he came to the conclusion that it was proper, then he had to consider whether it was a charge excluded by the latter part of the rule and, if he came to the conclusion that it was not, then he ought to have allowed something and I say not what.

What he did say was: "I consider the attendance of the plaintiff at this consultation as entirely unnecessary. The full facts were before junior counsel, or should have been, for his advice on evidence already allowed and any supplemental instructions in a case of this nature could have been laid before counsel in writing. This is, in my opinion, essentially a solicitor and own client item. I, therefore, overrule this objection."

It does surprise me that he should in this connexion refer to a solicitor and own client taxation, which cannot possibly apply. It is almost impossible to imagine circumstances in which a solicitor would pay the travelling expenses of his client in coming

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to London to attend a consultation with leading counsel. Therefore it is almost impossible to imagine how such a charge could ever find its way into a solicitor's bill and, therefore, almost impossible to imagine how it could ever be a solicitor and own client item. I cannot help thinking that there again there is plain indication that the taxing master was exercising his discretion in the light of some norm or standard which is not fully apparent but which in fact is not valid. Accordingly, these four items, 3, 4, 6 and 14, must be reviewed.

I now come to item 2. I have already read the master's answer to that objection and explained that counsel conceded that it was not well founded in law. Accordingly, item 2 must be reviewed. It seems to me that, for just the same reasons, items 5, 5a and 7 must be reviewed.

Now comes the biggest question in the case so far as money is concerned: Does the same reasoning also apply to item 12? Item 12 originally stood like this: "Instructions for brief—
" London agents, who had the conduct of the action, attendances
" upon and correspondence with the plaintiff and time spent by
" the plaintiff in correspondence with and attendances upon
" London agents and care and skill of the plaintiff and care and
" skill and responsibility of the London agents in the preparation
" of the plaintiff's case and for rebutting and disproving the
" gravest allegations of fraud against an officer of the Supreme
" Court of Judicature, professional misconduct and fraudulent
" conspiracy alleged by the defendant, and in particular in regard
" to the following matters." Then follow long particulars which I need not read, particulars which were put forward in support of a claim for £367 10s. Od., which was allowed at £84.

Somebody in the taxing master's office, not, I think, the taxing master himself, wrote in before the words "instructions
" for brief " " fee in lieu of," and that writing in has been ticked, by, I think undoubtedly, the master, with the tick of approval which he has given to a number of other alterations and queries in this bill.

As against the word "conduct," the anonymous writer has written "q. [which means 'query'], but this is an agency case
" the principal being also the plaintiff."

In a passage, which I have not read, which refers to correspondence between the parties in perusing the minutes of the company, the same hand has written: "q. cannot charge for
" perusing own correspondence."

Mr. Russell was anxious to tell me what took place with regard to this particular item of objection before the taxing master. I was not sure whether that was permissible or not and so I did not allow him to do so and, in the view that I take, it was unnecessary. But I mention it because, if another court should take a different view on the construction of the document itself hereafter, it will be open to Mr. Russell to contend that I ought to have allowed him to inform me what actually took place.

It seems to me that those interpolations, which were, of course, not made by the master himself but which must have come before him, and one of which appears to have been ticked by him, show plainly that this erroneous conception of the relationship between a solicitor and his London agent in regard to costs did influence the mind of the taxing master in his quantification of this item. The very words "fee in lieu of instructions for brief" point to that. They indicate that in the opinion of the writer the plaintiff, being a solicitor acting for himself, cannot give his London agents any instructions for brief and that, therefore, it has to be called "Fee in lieu of instructions for brief." In my judgment that is erroneous in point of law. Accordingly, I think I must also refer No. 12 for review.

I wish to make it plain that I have no idea how far the taxing master was affected in his quantification by this particular point. It may not have had any great bearing, or it may have had a great bearing. I do not know. The only thing that I do hold is that it must to some degree have affected his quantification and that, therefore, the item must be reviewed in the light of what I have said.

Objection No. 1 has been abandoned. The defendant made concessions on Items 8, 9, 10, 11 and 11a, which have been accepted, and, therefore, those items will not be referred for review.

Item 13 is this: "Part of Messrs. Burnicle, Appleby & Hope's charges," and the sum claimed was £33 13s. 9d. and the sum allowed £10 10s. 0d. What the objector says about that is this: "(a) Because it was essential for the plaintiff to call "Mr. Young as a witness"—Mr. Young was an auctioneer—and obtain a proof of his evidence and because in view of the charges of fraud made against him (in an action to which he was not a party) it was not unreasonable of Mr. Young to refuse to give evidence unless his own solicitors should advise him before and at the trial and to stipulate that his solicitors' costs should be paid by the plaintiff. (b) Because the plaintiff was

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“ placed in the position of having to undertake to pay Mr. Young’s solicitors’ costs owing to the defendant’s failure to join Mr. Young as a defendant to a counterclaim in which his charges of fraud could be contested by Mr. Young and Mr. Young could have recovered costs against the defendant if such charges failed as in fact they did. (c) Because it would be the worst possible advice to any client subject to charges such as were levelled at the plaintiff to recommend refusal to undertake to pay Mr. Young’s solicitors’ charges and to rely on a subpoena without proof of evidence. (d) Because the charges made by Messrs. Burnicle, Appleby & Hope were reasonable. (e) Because the charges of Messrs. Burnicle, Appleby & Hope in fact amounted to £33 13s. 9d. which the plaintiff has undertaken to pay and had to pay in order to obtain Mr. Young’s evidence and assistance and unless the plaintiff can recoup himself from the defendant in respect of these costs he will be out of pocket, and (f) Because the 10 guineas allowed by the taxing master is a purely arbitrary figure which cannot be justified.”

Mr. Young was, I think, plainly entitled to consult his solicitor before agreeing to give evidence, having regard to his own personal position in the matter; but I cannot imagine that that would have cost £33 13s. 9d., or anything like it. What I think that charge must include is all the advice which the solicitor gave Mr. Young about his own personal position in the matter. The taxing master says: “ I am doubtful whether these costs (the details of which I have carefully scrutinized) are properly chargeable against the defendant in this bill at all. The plaintiff’s proper course was to subpoena the witness in question. In all the circumstances, however, I have allowed a sum of £10 10s. 0d. to cover the witness’s solicitor’s fees in advising the witnesses to making and taking his statement, which I consider adequate. I therefore overrule the objection.”

I do not agree with the taxing master that the plaintiff’s proper course was to subpoena the witness in question. That is never a wise course to take if it can be avoided for the simple reason that a proof is not provided and, in the circumstances of this case, it was entirely reasonable for the plaintiff to take all proper steps to avoid subpoenaing Mr. Young.

On the other hand, I should be very loth to believe that Mr. Young, if he had been tendered £10 10s. 0d. in order to enable him to get his solicitor’s advice whether it was safe to attend and give evidence, would have been so unmindful of the interests of

justice as to have refused to give evidence unless a larger sum than that was tendered; in other words, it seems to me that £10 10s. 0d. would have been an ample sum to tender. Nothing of that sort was done, that is to say, nothing was tendered to him, and, as a result, this bill was tendered and the plaintiff felt bound to pay it. It does seem to me that this charge of £33 13s. 9d. does come directly within the second part of the sub-rule, as being "special charges or expenses to witnesses or "other unusual expenses." Therefore, in my judgment, the taxing master would have been justified in disallowing the whole item.

The observation of the objector that the £10 10s. 0d. allowed by the taxing master is a purely arbitrary figure which cannot be justified, may be true; but it would not lie in the mouth of Mr. Russell to persist in that objection and Mr. Alcock has no counter objections to the taxation.

I now come to items 15 and 16, which are in a different category again. The plaintiff's wife attended to give evidence and, I believe, gave evidence. Both items 15 and 16 relate to Mrs. Reed's witness fee. Item 15 relates to one day only, namely, October 2, 1950. That was, unfortunately, an occasion when I was ill and unable to try the case on the day on which it should have been tried. Accordingly, she had to return. In respect of that, £3 3s. 0d. was claimed and eventually 5s. 0d. allowed.

Item 16 relates to November 15, 16 and 17, that is to say, three days, when the case was heard, and the sum claimed then was £9 9s. 0d., which was eventually reduced to 15s. 0d. What the objector said about these two items was: "Because Mrs. Reed is entitled to a witness fee having regard to the absence from her domestic duties which giving evidence at the trial involved and there is no justification for disallowing this fee merely because she did not carry on a gainful occupation separate from her husband. Because even the old table of allowances to witnesses provides for fees for 'Gentlemen' and 'Females according to their station in life,' " to which the taxing master answered: "The witness in question follows no gainful occupation and there has been no evidence before me that she has lost anything financially except her expenses, which I have already allowed under another item. I am of opinion, therefore, that she is not entitled to anything more than a nominal sum as a witness fee which I assess at £1 altogether. To this extent I allow this objection. The old

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“scale of witness fees referred to is completely outdated and not
“in practice acted upon at the present time.”

It does seem to me that the taxing master's answer is really inconsistent with itself. If no witness who is not following a gainful occupation is entitled to anything without proof of actual loss, then he ought to have disallowed this item altogether. If, on the other hand, such a witness is entitled to something, he ought not to have made a nominal award, but ought to have made what he considered was a proper award. Accordingly, it seems to me that this answer must be wrong either way. The point is really rather difficult, but it does seem to me that a witness who is taken away from her domestic duties is entitled to something more than actual disbursements, though it may not be much more, and it seems to me that there is no reason for thinking that, though the old scale is certainly obsolete in these days, females are not allowed witness fees according to their station in life. I see no reason for thinking that a wife who is engaged in domestic duties and the bringing up of her children is entitled to absolutely nothing at all because she cannot prove that she did in fact get in a charwoman, or hire the services of a nursemaid, on the particular day. Therefore, this item which, though very small in amount, is important in principle, does seem to me to stand in this way: I think Mrs. Reed was entitled to a proper witness fee; that is to say, something more than a nominal fee, though not necessarily a substantial fee, for her absence from her domestic duties, and there is no justification for disallowing any fee, or anything but a nominal fee, merely because she did not carry on a gainful occupation separate from her husband. Accordingly, Nos. 15 and 16 must also be referred back for review. The objections, so far as they relate to the items which I have mentioned, are allowed, and I order that the taxation be referred back for review in the light of the principles contained in the judgment which I have just delivered.

Order accordingly.

Solicitors: *Ward, Bowie & Co., for Richard Reed, Sunderland; Maples, Teesdale & Co., for W. A. Ellis, Sunderland.*

K. R. A. H.

In re BIRKENHEAD CORPORATION.
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[1947 B. 3286]

Trade dispute—Reference to National Arbitration Tribunal—Dispute between employers and employees—Supplementation of war service pay—Jurisdiction of tribunal to adjudicate—Conditions of Employment and National Arbitration Order, 1940 (S.R. & O. 1940, No. 1305), cl. 7.

A school teacher in the employment of the B. Corporation joined His Majesty's Forces in 1941, was demobilized in 1945, and resumed his employment with the corporation.

In September, 1939, and January, 1940, the corporation passed resolutions that all servants who had been called up for war service should be paid during the pleasure of the council full pay, less government pay and allowances.

A dispute having arisen as to the right of the school teachers to benefit under the new Burnham scale of remuneration, which came into effect in 1945, the matter was reported by the National Association of Schoolmasters to the Minister of Labour and National Service and duly referred to the National Arbitration Tribunal, who made an award that the claim of the school teachers had not been established.

A summons having been taken out by one of the school teachers to determine whether he was entitled to a supplemental grant, the question arose whether the tribunal had jurisdiction to make the award:—

Held, that this was a trade dispute within the meaning of the definition of a trade dispute in clause 7 of the Conditions of Employment and National Arbitration Order, 1940; that the tribunal had jurisdiction to deal with the rights of employers and employees under private—as distinct from national—agreements and had consequently jurisdiction to make the award.

Rex v. National Arbitration Tribunal; Ex parte Horatio Crowther & Co. Ltd. [1948] 1 K.B. 424; [1947] 2 All E.R. 693; *Rex v. National Arbitration Tribunal; Ex parte Imperial Tobacco Co. Ltd.* [1943] 2 All E.R. 162; *Rex v. National Arbitration Tribunal; Ex parte Midgley Harmer Ltd.* [1947] 1 All E.R. 196 considered and applied.

ADJOURNED SUMMONS.

The plaintiff, Vincent Bernard Quigley, at the outbreak of the recent war, was in the employment of the Birkenhead Corporation as a school teacher. He joined His Majesty's Forces in 1941, and was demobilized in 1945.

On September 26, 1939, the corporation passed a resolution that, pursuant to the provisions of the Local Government Staffs

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(War Service) Act, 1939, all servants who had been called up for war service should be paid "during the pleasure of the council, "full pay, less government pay and allowances." On January 23, 1940, the council amended that resolution by a further resolution defining the meaning of the phrase "full pay." On December 12, 1945, the plaintiff resumed his employment as a school teacher with the corporation.

As a result of correspondence, the corporation expressed the view that the plaintiff's position with regard to remuneration was still governed by a resolution of the finance committee dated January 23, 1940, with the result that the plaintiff's augmentation would be governed by reference to the old scales and that he could not benefit under the new Burnham scale of remuneration which came into effect in 1945. A report was, therefore, on February 5, 1947, submitted by the solicitors representing the National Association of Schoolmasters to the Minister of Labour and National Service. The heading of the report was "In the "matter of the Conditions of Employment and National Arbitration Order, 1940 (S.R. & O. 1940, No. 1305), re a trade dispute "between members of the National Association of Schoolmasters "and the County Borough of Birkenhead," and it contained a notification to the Minister of the trade dispute, which existed between certain teachers and the corporation and which arose out of their claims for adequate augmentation of war service pay.

On consideration of the report the Minister referred the matter to the National Arbitration Tribunal, and statements of the employers' case and of the employees' case were lodged with the tribunal.

On April 22, 1947, the tribunal issued an award (Award No. 949), paragraph 3 of which was as follows: "The tribunal "have given careful consideration to the . . . submissions made "on behalf of the parties. They find that the claim has not been "established and award accordingly." In a footnote to the award it was stated that: "It is provided in the Schedule to the "Conditions of Employment and National Arbitration Orders, "1940 to 1944, that if any question arises as to the interpretation of any award of the tribunal "any party to the award may apply for a decision to the tribunal and the tribunal shall decide the matter, provided the consent of the parties has first been obtained.

On October 14, 1947, the plaintiff took out an originating summons to determine whether, on the true construction of the resolutions, the plaintiff was entitled to a supplementation grant

(a) at the rate laid down by the Remuneration of Teachers Order, 1945 (S.R. & O. 1945, No. 1317), or (b) at the rate applicable immediately before the coming into force of that Order in 1945. After some discussion the hearing of the summons was adjourned and, after a further application had been made to the tribunal and a further award (Award No. 1313) had been made by the tribunal, in which they found against the plaintiff's claim and awarded accordingly, the summons was restored to the list on July 25, 1951. The tribunal and the Minister were approached, and the latter intimated that, while not wishing to be added as a party to the proceedings, he would like to appear by counsel on the adjourned hearing. The tribunal did not wish to be represented. On October 24, 1951, the plaintiff amended the summons by adding in his claim to relief the words "notwithstanding Award No. 1313, dated August 23, 1949, of the National Arbitration Tribunal, which was ultra vires."

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Cyril Salmon K.C. and *N. N. McKinnon* for the plaintiff. The definition of a trade dispute in clause 7 of the Order of 1940¹ excludes a dispute between a workman and his employers arising out of the workman's contract of service. The settlement of a contractual dispute of this nature is outside the province of Defence (General) Regulation 58AA. The Order of 1940 was made to provide machinery for dealing with claims relating to extra wages or improved conditions, which were outside those to which their agreements already entitled the employees, i.e., claims which in a time of national emergency might lead to strikes and in respect of which no tribunal already existed to deal with them. Consequently, the Order of 1940 was made to avert such dangers and not to facilitate the settlement of private contractual disputes.

Notwithstanding the width of the definition of "trade disputes," differences arising out of the interpretation of personal agreements of service, as distinct from national agreements, are outside the definition and cannot be dealt with by the tribunal.

Henry Salt K.C. and *Miss B. A. Bicknell* for the defendant corporation. The present dispute is covered by the language of

¹ Conditions of Employment and National Arbitration Order, 1940, cl. 7: "'Trade dispute' means any 'dispute or difference between employers and workmen, or between

"workmen and workmen connected
"with the employment or non-employ-
"ment, or the terms of the employ-
"ment or with the conditions of
"labour of any person."

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the definition of a "trade dispute" and the tribunal had jurisdiction to deal with this question. The consideration and construction, not only of national but of private agreements, were clearly within the contemplation of the authors of the Order. The definition of a trade dispute is to be found as long ago as 1906 in substantially the same form: see section 5 (3) of the Trades Disputes Act, 1906; see, also, section 8 of the Industrial Courts Act, 1919. [Counsel referred to *Rex v. National Arbitration Tribunal and Others; Ex parte Imperial Tobacco Co. Ltd.*²]

S. B. R. Cooke (for the Minister) as *amicus curiae*. It is convenient to allow the tribunal to interpret these contracts. There is no necessary inconvenience in their interpretation being taken from the ordinary courts and entrusted to the tribunal. The intention of the legislature was to allow the tribunal to make speedy decisions. On the other hand, it would be inconvenient for a person who came to the tribunal for the determination of a question of this nature to be told to go away and obtain a decision by the court; and then to be obliged to come back to the tribunal.

Cyril Salmon K.C. replied.

Cur. adv. vult.

December 21. ROMER L.J. read a judgment, in which he stated the facts and continued:—On July 25, 1951, the originating summons was restored to my list for further hearing and, in the course of his opening, Mr. Salmon, for the plaintiff, submitted that the questions raised by the summons were not the same as the "dispute" which the tribunal had decided by award No. 1313, but, in the event of it being decided that they were the same, then he desired to submit further that the tribunal had had no jurisdiction to entertain the matter and had acted *ultra vires* in purporting so to do.

This second point appeared to me to raise a question of principle and one of such importance that it ought not properly to be decided without giving the tribunal and the Minister of Labour an opportunity of being represented and making such submissions on the question as they might desire to make. The summons accordingly stood over again and I gave the plaintiff leave to amend as he might be advised so as to raise this issue of *ultra vires*.

The tribunal and the Minister were approached and the latter intimated that, while not desiring to be added as a party to the

² [1943] 2 All E.R. 162.

proceedings, he would like to appear by counsel on the adjourned hearing. The tribunal did not itself wish to be represented.

On October 24, 1951, the plaintiff amended his originating summons by adding in his claim to relief the words "notwithstanding Award No. 1313, dated August 23, 1949, of the "National Arbitration Tribunal, which was ultra vires." On November 14, the summons, as so amended, came on before me for argument, and I had the advantage of hearing the contentions of the Minister advanced by Mr. Cooke.

Mr. Salmon, for the plaintiff, enunciated the following questions for consideration: (1) Whether under his contract of service with the defendant corporation the plaintiff was entitled to have his pay made up to the new Burnham scale between April 1, 1945, and November, 1945. (2) As to the true construction of the resolutions of the corporation passed respectively on September 26, 1939, and January 23, 1940, and in particular as to the proper interpretation of the words "full pay" as used therein. (3) Whether question (1)—in conjunction with question (2)—was the "dispute" which was the subject of award No. 1313. (4) If so, whether the National Arbitration Tribunal had jurisdiction to entertain it.

Of these questions, I propose to consider numbers (3) and (4) first; for, if they are both decided adversely to the plaintiff, then, as Mr. Salmon rightly conceded, the matter is *res judicata* and the plaintiff cannot succeed on his summons.

I should first observe that until the third occasion on which the summons came before me, on July 25, 1951, it had not been suggested, at all events to me, that either of these questions would arise for discussion. When the summons first came into the list, on May 7, 1948, Sir Andrew Clark appeared as leading counsel for the plaintiff, and he in no way disputed that, if in fact the plaintiff was, or was to be deemed to be, a party to award No. 949, he was bound by it, and it was in order to ascertain the position with regard to this that the matter was adjourned.

The inference from this was that the point at issue on the summons was the same as the "dispute" which had come before the tribunal and that that "dispute" was within the scope of the tribunal's jurisdiction.

On July 6, 1948, the matter was mentioned to me again and nothing was said on behalf of the plaintiff in challenge of the tribunal's jurisdiction; moreover, I have a note that on that occasion Sir Andrew Clark agreed that the question in issue between the parties was a trade dispute. However, I cannot say

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that the plaintiff is precluded from raising these points before me and it is, of course, clear that if, in fact, the tribunal acted ultra vires it could not be clothed with jurisdiction by admission or consent.

Were, then, the rights which the plaintiff seeks to have established by declaration on this originating summons the same as his claims which were negatived by award No. 1313?

Mr. Salmon put his case on this point in the following way :

(1) The corporation's resolutions of September 26, 1939, and January 23, 1940, amounted to offers to such of their employees as were affected by them (including the plaintiff), that the employees impliedly accepted those offers by continuing in the corporation's service and that the terms of the resolutions thenceforth formed a part of the men's service agreements. (2) On the true construction of the second resolution the phrase " full pay " included the new Burnham scale and accordingly the plaintiff and his fellow employees became contractually entitled to have their service pay made up to that scale from April 1, 1945, by virtue of S.R. & O. 1317. (3) That the question of the teachers' contractual rights was never presented to the National Arbitration Tribunal for consideration and that the only matter which was submitted to the tribunal on each of the applications was whether or not it was fair and equitable that the service pay augmentations should be increased. (4) That as the plaintiff is asserting before this court his contractual rights it follows that the question in issue on this summons is different from that which was in issue before the tribunal.

The argument on this question appears to rest mainly on the fact that no express reference to contractual rights is to be found in the statements of the employers' or employees' cases in the arbitration proceedings or in either of the awards themselves, and Mr. Salmon contends that this omission is inexplicable except on the footing that no question of contract was in issue. It is true, says Mr. Salmon, that in the employees' case on the first arbitration they submitted the same arguments on the construction of the two resolutions as the plaintiff has urged before me on this summons, but they only did so in order to show that the employers themselves adopted the same criterion of fairness as that which the employees were inviting the tribunal to apply. Further, I understood Mr. Salmon to say that, if in fact the employees did think in the arbitration proceedings that the resolutions conferred some sort of rights on them, they did not contemplate that such rights were contractual, but regarded them

as arising from a notion that the corporation, having passed the resolutions, were precluded in some way from going back on them.

I find myself unable to accept the plaintiff's contentions on this question. Mr. Salt (for the defendants) did not seek to dispute—at all events in this court—that the resolutions of the corporation should be regarded as incorporated in the service contracts of such of the employees as were affected by them: see *National Association of Local Government Officers v. Bolton Corporation*.³ From this it follows that, by virtue of those resolutions, the plaintiff and his fellow employees acquired contractual rights. Beyond this point, however, it seems to me that the argument for the plaintiff breaks down.

It is true that the contractual rights to which I have just referred were not precisely described as such in either of the arbitration proceedings or in the awards, but I cannot accept the suggestion that the proceedings were conducted without regard to them. In my opinion paragraph 8 (a) of the employees' case in the first arbitration points strongly to the opposite view; so also does paragraph 4 of the employers' case in the same proceedings in which they say that they "apprehend that it is the meaning "and application of the concluding words of the definition"—in the resolutions—"which is the cause and origin of the trade "dispute," and that the workmen were apparently contending that by reason of S.R. & O. 1317 "they are entitled to have their "service pay made up" to the new Burnham scale: see also paragraph 5 (c) of the employers' case.

If the employees were not relying on their contractual rights it is difficult to see why so much emphasis was placed by them on the resolutions in the presentation of their case—and, indeed, in the very earliest stages of the dispute, to which I have already referred. Nor do I see anything in the terms of Award No. 949 which tends to an opposite view.

So far as the second award is concerned the position is even clearer. The report which resulted in that award was in the same general terms as that of the first report, but it was not submitted until after the originating summons, in its unamended form, had been twice before the court. The summons is expressly mentioned in the statement of the employers' case. That case submits also that the facts and principles relating to Mr. Quigley were essentially the same as those on which the Award No. 949

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³ [1943] A.C. 166.

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was based, and reproduces as an appendix the employers' case in the previous arbitration.

As already stated, the plaintiff did not put in a statement of his case in the second arbitration, but he was represented at the hearing and he or his advisers knew that the subject of the originating summons was his contractual rights. That being so, one would have expected, if Mr. Salmon's contention were right, that the tribunal would have been invited to ignore the originating summons as being altogether irrelevant to the arbitration. Instead, Award No. 1313 states that the plaintiff's representatives "submitted that a determination of the dispute under the present reference prior to the outcome of the proceedings" in the Chancery Division "would conflict with the jurisdiction of the Court of Chancery." What this submission was intended to mean if it did not mean that the issues before the two tribunals were the same it is not easy to say.

I have no doubt that both in the first and in the second arbitration proceedings the employees' contractual rights under the two resolutions were in issue, and I must accordingly decide this question adversely to the plaintiff.

The next question for consideration is whether the tribunal had jurisdiction to decide the rights of the plaintiff under his contract of service with the corporation. The answer to this question depends on the true construction and effect of the Conditions of Employment and National Arbitration Order, 1940 (S.R. & O. No. 1305), but it would first be convenient to consider Defence Regulation 58AA, by virtue of which the 1940 Order was made and which, so far as relevant, is in the following terms: "(1) With a view to preventing work being interrupted "by trade disputes, the Minister of Labour and National Service "may by order make provision—(a) for establishing a tribunal "for the settlement of trade disputes, and for regulating the "procedure of the tribunal; (b) for prohibiting, subject to the "provisions of the Order, a strike or lockout in connexion with "any trade dispute; (c) for requiring employers to observe such "terms and conditions of employment as may be determined in "accordance with the Order to be, or to be not less favourable "than, the recognized terms and conditions; (d) for recording "departures from any rule, practice or custom in respect of the "employment, non-employment, conditions of employment, "hours of work or working conditions of any persons; (e) for any "incidental and supplementary matters for which the Minister "thinks it expedient for the purpose of the Order to provide."

Paragraph (4) is: "In this regulation the expression 'trade dispute' has the same meaning as in the Industrial Courts Act, 1919."

So far as material the Order of 1940 is as follows; the recital is: "The Minister of Labour and National Service (hereinafter referred to as 'the Minister') with a view to preventing work being interrupted by trade disputes and by virtue of the Defence (General) Regulations, 1939 (a), hereby makes the following order:"

Clause 1: "For the purpose of settling trade disputes which cannot otherwise be determined there shall be constituted by the Minister a tribunal to be called 'the National Arbitration Tribunal,' and the provisions of the schedule to this Order shall have effect with respect to the constitution and proceedings of the tribunal."

Clause 2: "(1) If any trade dispute exists or is apprehended that dispute, if not otherwise determined, may be reported to the Minister by or on behalf of either party to the dispute, and the decision of the Minister as to whether a dispute has been so reported to him or not and as to the time at which a dispute has been so reported shall be conclusive for all purposes. (2) The Minister shall consider any dispute so reported to him as aforesaid and if in his opinion suitable means for settling the dispute already exist by virtue of the provisions of any agreement to which the parties are organizations representative of employers and workers respectively, he shall refer the matter for settlement in accordance with those provisions: so, however, that where a matter has been referred for settlement in accordance with the provisions of this paragraph and there is a failure to reach a settlement or, in the opinion of the Minister, a settlement is unduly delayed, the Minister may cancel the reference and substitute therefor a reference to the National Arbitration Tribunal. (3) Where, in his opinion, no such suitable means of settlement exist as are mentioned in the last preceding paragraph of this Article, the Minister shall take any steps which seem to him expedient to promote a settlement of the dispute and may, if he thinks fit, refer the matter for settlement to the National Arbitration Tribunal. (4) Where steps to promote a settlement of the disputes have been taken by the Minister under the provisions of paragraph (2) or paragraph (3) of this Article (otherwise than by means of a reference to the National Arbitration Tribunal) and those steps have not resulted in a prompt settlement of the dispute, the Minister shall refer

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“ the dispute for settlement to the National Arbitration Tribunal
“ and shall do so within twenty-one days from the date on which
“ the dispute was so reported to him as aforesaid, unless, in his
“ opinion, the special circumstances of the case make it necessary
“ or desirable to postpone such reference. (5) Any agreement,
“ decision or award made by virtue of the foregoing provisions of
“ this Article shall be binding on the employers and workers to
“ whom the agreement, decision or award relates and, as from
“ the date of such agreement, decision or award or as from such
“ date as may be specified therein, not being earlier than the
“ date on which the dispute to which the agreement, decision or
“ award relates first arose, it shall be an implied term of the
“ contract between the employers and workers to whom the
“ agreement, decision or award relates that the rate of wages to
“ be paid and the conditions of employment to be observed under
“ the contract shall be in accordance with such agreement,
“ decision or award until varied by a subsequent agreement,
“ decision or award.”

Clause 3: “ The Minister may refer to the National Arbitra-
“ tion Tribunal for advice any matter relating to or arising out of
“ a trade dispute or trade disputes in general or trade disputes
“ of any class or any other matter which, in his opinion, ought to
“ be so referred.”

Clause 4: “ An employer shall not declare or take part in a
“ lockout and a worker shall not take part in a strike in con-
“ nexion with any trade dispute unless the dispute has been
“ reported to the Minister in accordance with the provisions of
“ Article 2 of this Order and twenty-one days have elapsed since
“ the date of the report and the dispute has not during that time
“ been referred by the Minister for settlement in accordance with
“ the provisions of that article.”

Clause 5: “ (1) Where in any trade or industry in any district
“ there are in force terms and conditions of employment which
“ have been settled by machinery of negotiation or arbitration to
“ which the parties are organizations of employers and trade
“ unions representative respectively of substantial proportions of
“ the employers and workers engaged in that trade or industry
“ in that district (hereinafter referred to as ‘recognized terms
“ ‘and conditions’) all employers in that trade or industry in
“ that district shall observe the recognized terms and conditions
“ or such terms and conditions of employment as are not less
“ favourable than the recognized terms and conditions.”

“ . . . (3): If any question arises as to the nature, scope
 “ or effect of the recognized terms and conditions in any
 “ trade or industry in any district or as to whether an employer
 “ is observing the recognized terms and conditions or is observing
 “ terms and conditions which are not less favourable than the
 “ recognized terms and conditions, that question may be reported
 “ to the Minister by any organisation of employers or any trade
 “ union which in the opinion of the Minister is an organisation or
 “ trade union that habitually takes part in the settlement of
 “ wages and working conditions in the trade or industry con-
 “ cerned and if so reported the question shall thereupon be dealt
 “ with in the same manner as if it were a trade dispute reported
 “ to the Minister under the provisions of Article 2 of this Order
 “ and the provisions of that Article shall apply accordingly; so,
 “ however, that in making an award on any question referred to
 “ by the Minister by virtue of the powers conferred by this para-
 “ graph the National Arbitration Tribunal shall have regard not
 “ only to the provisions of paragraph (2) of this Article, but also
 “ to any collective agreements concerning the terms and condi-
 “ tions of similar workers in comparable trades or industries.

“ (4) Where an award has been made by the National
 “ Arbitration Tribunal in consequence of a report made under
 “ the foregoing provisions of this Article then as from the date
 “ of the award or from such date as the Tribunal may direct, not
 “ being earlier than the date on which the question to which the
 “ award relates first arose, it shall be an implied term of the con-
 “ tract between the employer and workers to whom the award
 “ applies that the rate of wages to be paid and the conditions of
 “ employment to be observed under the contract shall, until
 “ varied by a subsequent agreement, decision or award such as is
 “ mentioned in the foregoing provisions of this Article, be in
 “ accordance with the award.

“ (5) Any reference in the foregoing provisions of this Article
 “ to an agreement, decision or award shall be construed as a
 “ reference to that agreement, decision or award as modified by
 “ any subsequent agreement, decision or award. . . .”

Clause 7 defines a trade dispute as follows: “ ‘ trade dispute ’
 “ means any dispute or difference between employers and work-
 “ men, or between workmen and workmen connected with the
 “ employment or non-employment, or the terms of the employ-
 “ ment or with the conditions of labour of any person.”

Mr. Salmon did not contend that on this definition a dispute
 between one employee and his employers is not included within

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it—and, indeed, I understand that this point has been affirmatively decided by a Divisional Court. Further than this Mr. Salmon conceded that if the terms of the definition be given their literal meaning they are wide enough to include the dispute which has arisen between Mr. Quigley and the corporation. He argued, however, that some of the other provisions of the Order of 1940 compel a narrower construction of the definition than that which its language *prima facie* demands; and in particular that the literal interpretation of the definition should be cut down so as to exclude a dispute between a workman and his employers arising out of the interpretation of the workman's contract of service.

The way he put his case was this. He argued first that the settlement of contractual disputes was outside the purview of Defence Regulation 58AA, which envisaged claims of employees not in enforcement of their contractual rights, but for extra wages or improved conditions which were outside and beyond those to which their agreements already entitled them; claims for the settlement of which no tribunal already existed and which, unless speedily dealt with, might lead to disastrous strikes in a time of national emergency.

The Order of 1940 was brought into being in order to avert such dangers as these and not to facilitate the settlement of private contractual disputes for the determination of which tribunals, namely, His Majesty's courts, already existed.

Mr. Salmon then pointed to sub-clause (5) of clause 2 as supporting this general approach to the Order. This sub-clause has a dual effect. It provides, first, that any award made under clause 2 shall be binding on the employers and employees concerned; and, secondly, that as from the date of the award (or other date as therein specified) its terms shall (in effect) be incorporated by implication in the contracts already existing between such employers and employees respectively. How, asked Mr. Salmon, could an award interpreting a provision of a subsisting contract be implied as a term of that contract? What the second part of sub-clause 2 is aiming at, he says, is the incorporation in the contract of something that is not already in it, for example, some change in wages or working conditions.

Mr. Salmon then contrasted clause 2 of the Order with clause 5. That clause, whilst empowering the reference of certain agreements to the tribunal, is confined to national agreements; and although the tribunal can consider and decide the effect of such agreements there is no provision (as there is in

clause 2) that its award shall be binding on the parties concerned, it is merely provided that it shall thenceforth be an implied term of the national agreement to which it relates.

From the above considerations Mr. Salmon proceeds to the conclusion that, notwithstanding the width of the definition of "trade dispute," differences arising out of the interpretation of private, as distinct from national, agreements of service are outside it. And, by way of illustration, he said that it would be monstrous if an employee, having a long term service agreement, who was summarily dismissed for fraud, could be taken, at the instance of his employers, to the tribunal and be thus deprived of his rights as a citizen to have his case heard and determined by a judge and jury.

The contrary arguments (apart from the citation of authority which I will consider later) of Mr. Salt and Mr. Cooke may be summarized as follows. The language of the definition of "trade dispute" in the Order so plainly covers differences such as that which has arisen between Mr. Quigley and the corporation that the court cannot be justified in excluding them in the absence of compelling indications in other parts of the Order; and that no indications sufficiently compelling are to be found. My attention was drawn to the fact that the definition is not the hurried work of some hard-pressed draftsman in time of war, but was fashioned in its present shape so long ago as 1906.

The definition is to be found in substantially the same terms in section 5 (3) of the Trades Disputes Act, 1906. This statute was not concerned with industrial conciliation, but the definition, in precisely its present form, appears again in section 8 of the Industrial Courts Act, 1919. And, as appears from Defence Regulation 58AA, that regulation specifically provides that the term is to have the same meaning as that in the Act of 1919.

It is accordingly argued, with some force, that a strong case must be made out for whittling down the plain meaning and effect of words which presumably have received legislative consideration over so long a period of years; and which no legislative authority has ever thought proper to alter.

It was then submitted that in practically every case where a dispute arises by reason of employees demanding, and employers refusing, an increase in wages or improved conditions, the first thing the tribunal has to do is to inquire what are the subsisting wages and conditions to which the men, by virtue of their contracts, are already entitled; and that in many cases such inquiry necessarily involves the interpretation of such contracts by the

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tribunal. From this it is argued that the consideration and construction, not only of national, but of private agreements as well, must surely have been within the contemplation of the authors of the Order.

As to the plaintiff's argument founded on the second provision of clause 2 (5), it was submitted to me that the fact that it could have no application to a case such as the present is irrelevant and is quite insufficient to warrant the cutting down of the definition of trade dispute in the way that the plaintiff invites me to do. The first provision of the sub-clause is applicable to all decisions or awards of the tribunal, including the one now under consideration, made on reference to it under clause 2. The second provision is applicable to the general run of such references made on claims for wages or conditions beyond those already conferred by contract. The fact that this particular provision is inapplicable to certain claims cannot justify the view that, notwithstanding the plain meaning of "trade dispute" in the definition clause, the scope of the Order is confined to disputes which admit of the application of that provision.

In my judgment, and apart altogether from such authority as exists on the subject, the arguments of Mr. Salt and Mr. Cooke are sound. The obvious intention of the Order of 1940 was to establish a tribunal which could deal, and deal speedily (for speed was clearly one of the main objects of the Order), with disputes between employers and workmen which, unless so dealt with, might result in strikes and lockouts at a time when this country could least afford industrial unrest. Such unrest can well arise from a grievance, real or imaginary, arising under a private contract of service, and it appears to me to be inherently improbable that the intention of the Order was to exclude disputes resulting from such grievances from its scope. Approaching the Order, then, from this point of view, one is not surprised to find that disputes of this character are unquestionably within its scope, if one looks to the definition clause alone; and in my judgment it would require a great deal more than the matters relied on by Mr. Salmon to justify the alteration of the definition and, by so doing, to arrive, not at an expected, but at an unexpected, result.

I am not greatly impressed by the force of Mr. Salmon's hypothetical long term employee summarily dismissed for dishonesty. Assuming that the difference arising therefrom could in fact be regarded as a "trade dispute," the jurisdiction of the tribunal would only be concurrent with, and not exclusive of, that of the courts. And if the employee immediately issued a

writ for damages, as he most probably would do, I have no doubt that the Minister could and would (unless anticipating immediate industrial unrest) refrain from taking action on any report submitted to him by the employers pending the trial in the courts. If, on the other hand, he had reason to suppose that the dismissal would occasion immediate and widespread sympathetic strike action by fellow employees or others, I see no reason why he should not avail himself of the speedy machinery of the tribunal rather than wait until the employers' action had been decided by the courts and, possibly, by the ultimate appellate tribunal.

I turn now to the authorities to which I was referred. In *Rex v. National Arbitration Tribunal; Ex parte Horatio Crowther & Co. Ltd.*⁴ the headnote to the report in the All England Reports, so far as material, is as follows: "Since "November, 1946, workmen employed by the applicants, a "company, through their union had pressed for changes in "wages and conditions of service. On March 28, 1947, the "company gave the workmen on the manufacturing side of "their business, including those in the union, notice terminating their employment as from April 4. On April 14, the "matter was reported to the Minister of Labour and National "Service, who referred it to the National Arbitration Tribunal. "The claim of the workmen included inter alia: '(1) The reinstatement from the date of dismissal of the workers dismissed.' "The award of the tribunal stated: 'They find in favour of the "claim set out in item (1) . . . and award accordingly.' On an "application for an order of certiorari to quash the award: *Held*: "(i) although at the date of the report to the Minister of Labour "the contract of service between the company and the workmen "had been terminated, there was nevertheless a 'trade dispute,' "within the meaning of art. 7 of the Order of 1940, which had "been properly referred under art. 2 (1). (ii) a direction to "reinstatement of the workmen would be ultra vires the tribunal, and, "as (Croom-Johnson J. dissentiente) the finding on item (1) of "the claim was equivalent to such a direction, the award in so "far as it relates to that finding must be quashed."

Lord Goddard C.J., after referring in his judgment to the notice determining the men's employment, said that no question arose as to that being in any way a notice otherwise than in accordance with the contracts of service. Then, in the course of considering and rejecting the argument submitted on behalf of

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⁴ [1948] 1 K.B. 424; [1947] 2 All.E.R. 693.

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the employers that there could not be a trade dispute between them and employees whose employment had already been determined, said ⁵: "Supposing a dispute arose whether the workers in a particular industry or branch of an industry could be, as the employers contended, dismissed at an hour's notice, or whether they were entitled, as the workers contended, to a week's notice. There you would have a dispute connected with the terms of employment. It appears to me clear that an employer could not avoid a reference by the Minister if the matter was reported to him by discharging his workmen and saying: 'They are no longer in my service, whether I rightly or wrongly dismissed them.' If an employer discharges his workmen without proper notice, although the workmen would have an action for wrongful dismissal, they are not from the moment of discharge in the employer's service, but if the contention advanced by the employers in this case be right the question of what notice workers in this industry or this factory should be given could not be settled by the tribunal."

In *Rex v. National Arbitration Tribunal and Others; Ex parte Imperial Tobacco Co. Ltd.*,⁶ the headnote is as follows: "A War Emergency Committee was set up in the tobacco industry in 1941, and the workers' side of the committee asked for increases of rates of wages, which the employers' side refused. As they were unable to come to an agreement the Ministry of Labour and National Service, in answer to an application by the workers' side, made an order under the Conditions of Employment and National Arbitration Order, 1940, referring the dispute to the National Arbitration Tribunal, a body set up by the same order. The employers applied for orders of prohibition on the ground that the tribunal had no jurisdiction to hear the dispute. They maintained that the Conditions of Employment and National Arbitration Order, 1940, art. 1, which provided that the tribunal should be constituted for 'the purpose of settling trade disputes which cannot otherwise be determined' must be construed as 'for the purpose of settling trade disputes for the determination of which no machinery exists,' and that, as the workers' claims were in effect claims for minimum rates, the machinery of the Trade Board existed for the settlement of the disputes:—*Held*, the workers' claims were not for minimum rates of wages. The disputes arose out of claims for rises on actual rates of wages paid, and, consequently, the Trade Board had no jurisdiction to hear the

⁵ [1948] 1 K.B. 424, 429–30.

⁶ [1943] 2 All E.R. 162, 166.

“ present disputes. The Conditions of Employment and National Arbitration Order, 1940, has to be read as a whole and art. 1 “ does not limit the jurisdiction of the tribunal.”

For present purposes the case is mainly useful for the observations of the members of the court on the scope of the Order of 1940, notwithstanding the apparently limiting or qualifying words which are to be found in clause 1. On this subject Lord Caldecote C.J. said: “ When the words of the Conditions of “ Employment and National Arbitration Order, 1940, art. 2, “ are looked at, it will be seen that the article deals with trade “ disputes, that is, trade disputes within the meaning of the “ definition. . . . I, therefore, think that these are trade disputes “ which cannot otherwise be determined either by the Trade “ Boards or by agreement. I further think that upon a proper “ review of this Order, the jurisdiction of the National Arbitration “ Tribunal is not to be found in the introductory words of art. 1, “ but is to be ascertained from the order as a whole. If a trade “ dispute gets before the National Arbitration Tribunal regularly, “ it seems to me that jurisdiction to entertain the dispute in “ question follows as a matter of course. Let me look at art. 2 “ to see how the matter stands. Art. 2 (1) of the Order provides “ in the widest terms, quite unqualified terms, that: If any trade “ dispute exists or is apprehended, that dispute, if not otherwise “ determined, may be reported to the Minister. . . . Art. 2 (2) “ provides that the Minister shall—he must—refer the matter for “ settlement in accordance with any suitable means, suitable, “ that is, in his opinion, for settling the dispute, which are the “ result of agreement, but it is still true to say that that applies “ to any trade dispute. Art. 2 (3) says that, failing suitable “ means, the Minister may refer the matter for settlement to the “ National Arbitration Tribunal, and art. 2 (4), under which I “ think the Minister was acting in this case, provides that when “ . . . steps have not resulted in a prompt settlement of the “ dispute, the Minister shall refer the dispute for settlement to “ the National Arbitration Tribunal. . . . Those provisions seem “ to be quite plainly to give jurisdiction to the National Arbitration Tribunal to entertain a trade dispute which has been “ properly referred to it; otherwise it seems to me nonsense would “ be made of the articles to which I have referred, and I see no “ reason why any limitation of the right of the National Arbitration Tribunal should be supposed to exist, subject to this, that “ it must be a trade dispute, and it must be a trade dispute which “ has come before the Arbitration Tribunal in accordance with

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“ the provisions to which I have referred. I think it is a much
“ safer way of construing these provisions which create the
“ tribunal and create the jurisdiction of the tribunal to refer
“ to the operative words of the article as a whole, than to pay
“ attention solely to the introductory words of art. 1, where the
“ purpose of the establishment of the National Arbitration Tribunal
“ is stated.”

Humphreys J., in the course of his judgment, after referring to the words “ For the purposes of settling trade disputes which
“ cannot otherwise be determined ” in art. 1 of the Order, said :
“ All I desire to say about that is that I am quite clearly of
“ opinion, with my Lord, that whatever may be the effect of
“ the introduction of these words, they cannot and do not limit
“ the jurisdiction of the Minister or of the National Arbitration
“ Tribunal. . . . It is not the law of England that any tribunal
“ set up by Parliament or by a statutory order can be prohibited
“ from functioning, so long as it keeps within the terms of the
“ statute or the Order merely because there may be a different
“ way, which that body cannot take, of arriving at the same
“ result.”

Asquith J. dealt with the matter as follows⁷: “ I agree with
“ the judgments delivered by my Lords, and I would only add a
“ few sentences on a single point, that is, on the construction of
“ the words ‘ which cannot otherwise be determined ’ in art. 1.
“ It has been contended that those words mean ‘ for the deter-
“ mination of which no other machinery, whether statutory or
“ otherwise, exists.’ If they did mean that, in my view, that
“ would not curtail the jurisdiction of the tribunal. But can
“ they mean that? The Order must be read as a whole. Art. 2
“ provides that where suitable means of settling the dispute exist
“ by virtue of an agreement, the Minister has to resort to those
“ means, and do so unsuccessfully, before he can refer the dispute
“ to the tribunal. The words in art. 1 are, in my view, no more
“ than an anticipation, in language perhaps unnecessarily wide, of
“ this later provision. Indeed, I am not sure that the language
“ is even unnecessarily wide, for while the words ‘ which cannot
“ otherwise be determined ’ are capable of meaning ‘ which
“ cannot be determined by any other means,’ they are equally
“ capable of meaning ‘ which cannot be determined by certain
“ specific other means,’ namely, the means specified below in
“ art. 2 (2), and this is, in my view, their true meaning.”

⁷ [1943] 2 All E.R. 162, 169.

⁸ Ibid. 171.

In *Rex v. National Arbitration Tribunal; Ex parte Midgley Harmer Ltd.*,⁹ the facts, as extracted from the headnote, were as follows: "On May 23, 1945, the Minister referred to the tribunal a dispute arising out of a claim by some of the employees of M. H. Ltd. for an increase of pay under the terms of an agreement dated August 9, 1944, between the Engineering and Allied Employers' National Federation and certain trade unions. M. H. Ltd., who were not a party to that agreement, were paying their employees at a higher rate than that mentioned in the agreement, and they contended that the agreement did not, therefore, apply to them, that art. 5 of the Order of 1940 did not make it apply, and that the tribunal had no jurisdiction to entertain the dispute."

Lord Greene M.R. stated that the particulars of the dispute referred to the tribunal by the Minister were: "The dispute arises out of a claim made by the workmen mentioned in Sch. 1 for increases in rates of pay under the terms of the agreement dated August 9, 1944, between the Engineering and Allied Employers' National Federation and certain trade unions."

Then, after referring to Defence (General) Regulations 58AA and art. 1 and other provisions of the Order of 1940, the Master of the Rolls said: "The only limit on the jurisdiction of the tribunal which appears there is that the matters that can be referred to it are confined to trade disputes. The definition of 'trade dispute' is to be found in art. 7 of the Order." The Master of the Rolls then read the definition and proceeded: "It appears to me to be really incapable of argument that, on the true construction of that definition, the present dispute is not a trade dispute within the meaning of the Order. The employers, on the one hand, and the workpeople, on the other, are in dispute or difference connected with the terms of employment, namely, the wages which the employees are to be paid. Prima facie, therefore, the matter is clearly a trade dispute in respect of which the National Arbitration Tribunal is the competent body to decide."

Then, on a reference to art. 5 of the Order of 1940 and to the terms of the agreement of August 9, 1944, the Master of the Rolls said: "The employers' case, as far as I understand it, is of this nature. They say that this agreement, which, for convenience, I shall call the national agreement, does not provide for increases to be given to female workers save in the case of those who

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⁹ [1947] 1 All E.R. 196, 197, 198.

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“ are earning wages at rates mentioned in the agreement itself.
“ It does not apply, they argue, and art. 5 does not make it
“ applicable, to a case where the wages of the female workers
“ are already above the scales mentioned in the agreement.
“ Therefore, it is said, the National Arbitration Tribunal has no
“ jurisdiction to take this controversy into consideration, in other
“ words, it is not competent to the employees to say that this
“ agreement applies to them and gives them the right, pursuant
“ to art. 5 of the Order of 1940, to the increase which they are
“ demanding. The employees say that the effect of the agree-
“ ment, on its true construction, as put into force against the
“ employers under art. 5 of the Order, gives to the female
“ employees of Midgley Harmer Ltd. the right to the increases
“ mentioned, irrespective of what they were earning before. Why
“ that does not constitute a trade dispute, I am afraid I am
“ incapable of understanding.”

Morton L.J. said: “ I agree. In the present case there is a
“ dispute as to the meaning and effect of the agreement of Aug. 9,
“ 1944. In my judgment, that is plainly a trade dispute within
“ the definition contained in the Conditions of Employment and
“ National Arbitration Order, 1940. The argument of counsel for
“ the employers really amounts to this: ‘ The construction which
“ ‘ my clients seek to place on the agreement of Aug. 9, 1944, is
“ ‘ clearly right. If the National Arbitration Tribunal decides
“ ‘ against my clients, it will be deciding wrongly. On Feb. 28,
“ ‘ 1945, in a similar case, the National Arbitration Tribunal did
“ ‘ decide wrongly, and I am apprehensive that they will do the
“ ‘ same again.’ That is not an objection to jurisdiction. It is
“ merely a suggestion that the tribunal has misconstrued the
“ agreement once and will misconstrue it again. It is not for this
“ court to form any view about the meaning of the agreement.
“ That is entirely a matter for the tribunal, and I, of course, have
“ formed no view one way or the other.”

As to these cases, Mr. Salmon says that the statement which I have cited from the judgment of Lord Goddard in *Ex parte Horatio Crowther & Co. Ltd.*¹⁰ was obiter. So it was, but it is a clear guide to what the Lord Chief Justice’s views were on the point which I am considering and I accord to it the weight to which all the opinions, judicially expressed, of Lord Goddard are entitled.

¹⁰ [1948] 1 K.B. 424.

Then, as to *Ex parte Imperial Tobacco Co. Ltd.*,¹¹ Mr. Salmon, whilst admitting that the observations of Lord Caldecote and Humphreys J. are against him so far as they go, submits that they did not go far enough. Moreover, he placed some reliance (which I am afraid I do not myself appreciate) on the judgment of Asquith J.

With regard to *Ex parte Midgley Harmer Ltd.*,¹² Mr. Salmon said that the agreement which was there under discussion was a national agreement, and so apparently it was. It was pointed out, however, by Mr. Cooke that the Master of the Rolls, in his judgment, said that the reference by the Minister was not under clause 5 of the Order of 1940, but under clause 2, and there seems to be no sufficient ground for supposing that this was not the case.

On the whole it seems to me that, although none of the cases to which I have referred is direct authority in support of the proposition that the National Arbitration Tribunal had jurisdiction to deal with the rights of employers and employees under private—as distinct from national—agreements of service, the judicial utterances which I have cited tend to suggest that my own view that the tribunal had such jurisdiction is correct; and no authority was cited to me to the contrary. I accordingly hold that, not only did the tribunal in fact decide the question which the plaintiff has sought (albeit in a somewhat inconvenient and inconclusive way) to put in issue on the present originating summons, but it had full jurisdiction to do so. From this it follows, as Mr. Salmon conceded, that the matter is, as between Mr. Quigley and the defendant corporation, *res judicata*.

In these circumstances the question on the construction of the resolutions of October 4, 1939, and January 23, 1940, which was argued before me does not arise. I had at one time thought that, even if my view of the questions which I have already considered should be adverse to the plaintiff, as it is, nevertheless it would be convenient to express my conclusion on the meaning and effect of the resolutions. On reflection, however, I think that it would be better if I refrained from doing so. There seems little point in indicating whether, in my judgment, the tribunal came to a correct or an incorrect view on a matter which, as I see it, I have no right to consider at all. The question of construction is a short one and not one of a kind on which, in the event of this case going further, the task of the Court of Appeal,

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¹¹ [1943] 2 All E.R. 162.

¹² [1947] 1 All E.R. 196.

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in deciding it, would be materially lightened by having before it the view of the court below.

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It only remains for me to dismiss, for the above reasons, the originating summons; and I accordingly do so, with costs.

Summons dismissed.

v.
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Solicitors: *Craigen, Hicks & Co.; Robins, Hay & Waters, for Donald P. Heath, Town Clerk, Birkenhead; Solicitor, Ministry of Labour and National Service.*

J. L. D.

VAISEY J. NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST
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Dec. 13,
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Electricity—Supply—Erection of poles to carry overhead supply—Interference with amenities of landowners—Restrictive covenants—Validity—Electricity (Supply) Act, 1919 (9 & 10 Geo. 5, c. 100), ss. 21, 22—If covenants enforceable the statutory powers would override.

By a deed dated April 2, 1936, and made between the Ecclesiastical Commissioners (the predecessors in title of the Church Commissioners, the second defendants) of the one part and the plaintiffs of the other part, it was recited that the commissioners had agreed to impose on certain common lands of which they were the owners restrictive covenants therein contained for the benefit of Midsummer Hill (owned and occupied by the plaintiffs) and for the purpose of preserving the amenities of the Malvern Hills, and the two relevant restrictive covenants were: (1) No act or thing shall be done or placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land and (2) No building shall at any time hereafter be erected upon any part of the land by or with the consent of the covenantors.

The first defendants, an area board constituted under the Electricity Act, 1947, entered on a small part of those common lands and began to erect poles on it for the purpose of carrying electric cables across it. In an action brought by the plaintiffs claiming an injunction against both defendants to restrain the erection or maintenance of the poles on the common lands:—

Held, (1) that the first covenant was void for uncertainty and therefore unenforceable; (2) that it was only as owners of Midsummer

Hill that the plaintiffs would have had any right of action in respect of those covenants and no right of theirs as such owners had been infringed; (3) that there had in fact been no breach of either covenant and (4) that in any event the first defendants were acting within their statutory powers, so that, even if the covenants had been (a) enforceable and (b) infringed, both defendants were relieved from any obligation to comply with the restrictions.

Per curiam: (1) By reason of section 21 of the Electricity (Supply) Act, 1919, it was not incumbent on the Electricity Board to obtain the consent of the local authority to place electric lines above ground notwithstanding the incorporation in the Electricity Act, 1947, of the provisions of the Electric Lighting (Clauses) Act, 1899, Sch., s. 10 (b).

(2) Persons entitled to enforce restrictive covenants are "parties concerned" within the proviso to section 22 (1) of the Act of 1919, incorporated in the Act of 1947, to whom an opportunity of "being heard" should be given.

ACTION.

By a deed dated April 28, 1936, and made between the Ecclesiastical Commissioners, who were the predecessors of the Church Commissioners, the second defendants, of the one part and the National Trust of the other part, after recitals, which stated that the Ecclesiastical Commissioners had agreed to impose on certain common lands belonging to them, being part of the Malvern Hills, the restrictive covenants thereafter contained and occupied by the National Trust, and for the purpose of preserving the amenities of the Malvern Hills, it was witnessed that, in pursuance of that agreement, the Ecclesiastical Commissioners, "with intent and so as to bind as far as practicable the "restricted lands"—i.e., the common lands—"into whatsoever "hands the same may come and to benefit and protect Midsummer Hill aforesaid," covenanted with the National Trust at all times thereafter to observe the stipulations and restrictions contained in the schedule. The first two restrictions were as follows: " (1) No act or thing shall be done or placed or permitted "to remain upon the land which shall injure prejudice affect or "destroy the natural aspect and condition of the land except as "hereinafter provided. (2) No building shall at any time hereafter "be erected upon any part of the land by or with the consent of "the covenantors" [namely, the Ecclesiastical Commissioners].

Shortly before the commencement of the present action the Electricity Board entered on a small part of the common lands and began to erect some poles to carry an overhead electric supply

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across part of the common lands. The poles consisted of wooden poles in pairs connected by cross-struts, and were about 42 feet in height. Lines of cable were carried across the top of these poles and linked them together in a continuous line.

The National Trust began an action against the Electricity Board and the Church Commissioners alleging that the erection, existence and maintenance of these poles and this electric supply line constituted a breach of the restrictive covenants. They pleaded that they had thereby suffered damage, that their enjoyment of Midsummer Hill had been seriously disturbed, and in particular that the view from Midsummer Hill over the common lands was prejudicially affected. They claimed a declaration that they were entitled to enforce the restrictive covenants against both defendants and an injunction to restrain the erection or maintenance of certain of the poles and the suspended supply line. They claimed, also, a mandatory order to pull down and remove some of the poles.

Michael Browne for the plaintiffs. The questions to be decided are (1) whether what has been done or is intended to be done is a breach of the covenants, and (2) whether the statutory powers conferred on the board enable them to override the restrictive covenants contained in the deed of 1936. The erection of the poles constitutes a breach of the restrictive covenants and the view from Midsummer Hill over the common lands has been prejudicially affected. [Counsel referred to *Metropolitan Asylum District v. Hill*,¹ *Wood v. Cooper*² and *Mander v. Falcke*.³]

Pennycuik K.C. and *J. F. Bourke* for the defendants, the Electricity Board. The restrictive covenants cannot be enforced unless they affect the actual owner of the piece of land against whom the order is to be made. They are void for uncertainty. First, with regard to the word "aspect," the question arises whether the aspect is from a certain point on Midsummer Hill or from any place in the world; and, secondly, the covenants are too vague and do not affect the restricted land.

If the court does not regard the restrictive covenants as void and unenforceable, a further question arises, namely, whether they are overridden by the statutory powers conferred on the board.

¹ (1881) 6 App.Cas. 193.

³ [1891] 2 Ch. 554.

² [1894] 3 Ch. 671.

The real point of the case is the construction and effect of section 22 of the Electricity (Supply) Act, 1919.⁴ That section, without the proviso, would not give any power to interfere with private property. Section 22 confers on the board power to place a line above the ground. It would be very embarrassing to suggest that everyone with an interest in the land is an owner of the land. [They referred to *Metropolitan Asylum District v. Hill*⁵ and *Kirby v. School Board for Harrogate*.⁶]

An aggrieved party has a right under section 17 of the Electric Lighting Act, 1882, if he can prove that he has suffered any pecuniary damage. All other parties retain their interest subject to the overriding statutory powers.

F. G. King for the commissioners.

Michael Browne in reply. The benefit of the covenant is annexed to the land and it is a binding and effective covenant; it is extremely wide—wide enough to cover anything which will alter the appearance of the land. When a covenant of this kind is broken, it is not necessary to wait until damage has been done before seeking to enforce it. [Counsel referred to *Western v. MacDermott*⁷ and to *Shelfer v. City of London Electricity Lighting Co.*⁸]

⁴ Electricity (Supply) Act, 1919, s. 22: "A joint electricity authority "or any authorized undertakers may "place any electric line below ground "across any land, and above ground "across any land other than land "covered by buildings or used as a "garden or pleasure ground in cases "where the placing of such lines "above ground is otherwise lawful, "and where any line has been so "placed across any land the joint "electricity authority or undertakers "may enter on the land for the purpose of repairing or altering the line: "Provided that, before placing any "such line across any land, the joint "electricity authority or undertakers "shall serve on the owner and occupier "of the land notice of their intention, "together with a description of the "nature and position of the lines "proposed to be so placed; and if, "within 21 days after the service of "the notice, the owner and occupier "fail to give their consent or attach "to their consent any terms or conditions or stipulations to which the

"joint electricity authority or the "undertakers object, it shall not be "lawful to place the line across that "land without the consent of the "Board of Trade" (now the Minister of Fuel and Power); "and the Board "of Trade" (the Minister) "may, if "after giving all parties concerned "an opportunity of being heard they "think it just, give their consent "either unconditionally or subject to "such terms, conditions, and stipulations as they think just; and in "deciding whether to give or withhold their consent, or to impose any "terms, conditions, or stipulations (including the carrying of any portion "of the line underground) the Board" (the Minister) "shall, among other "considerations, have regard to the "effect, if any, on the amenities or "value of the land of the placing of "the line in the manner proposed."

⁵ 6 App.Cas. 193.

⁶ [1896] 1 Ch. 437, 442.

⁷ (1866) L.R. 2 Ch. 72, 75.

⁸ [1895] 1 Ch. 287.

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VAISEY J., after stating the facts:—The first and fundamental point to be considered is the meaning and effect of the restrictive conditions. Let me deal first with the second, which reads as follows: “No building shall at any time hereafter be erected upon any part of the land by or with the consent of the covenantors,” a word which now, in the events which have happened, means the Church Commissioners. In my judgment, these poles are certainly not buildings, though they may well be erections or structures, and for that proposition I rely on *Wood v. Cooper*⁹ and *Paddington Corporation v. Attorney-General*.¹⁰ But even if they are buildings, they have not been erected by or with the consent of either the Ecclesiastical Commissioners or the defendants, the Church Commissioners.

The matter, therefore, in my view rests on the first of the restrictions, which it will be remembered is to this effect: “No act or thing shall be done or placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land except as hereinafter provided.” (I pause there to say that in my opinion the exceptions do not throw any light at all on the point which has arisen here.) In my judgment the wording of that first restriction is extremely inapt and ill-considered. It may perhaps be paraphrased thus: “No act shall be done and no thing shall be placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land.” It would be difficult to find wider, vaguer and more indeterminate words than those. “Affect” following the word “prejudice” cannot, I think, mean “prejudicially affect” and must, therefore, mean “affect whether prejudicially or otherwise,” that is to say change, or alter. What is to be the criterion of such alteration of the natural aspect and condition of the land? There is no such qualification as might have been introduced by such words as “in the opinion of the National Trust” after the words “which shall,” a qualification which would appear to have been accepted as sufficient in the case of *Zetland (Marquess) v. Driver*,¹¹ where the words were “no act or thing shall be done or permitted” on certain lands “which in the opinion of the vendor may be,” among other things, “prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood.” It is, no doubt, easy to suggest some acts and things which would come within the prohibition—if, for

⁹ [1894] 3 Ch. 671.¹¹ [1939] Ch. 1.¹⁰ [1906] A.C. 1.

instance, the land were ploughed up or turned into a car-park or building estate. The difficulty here is to ascertain the limits of the prohibited acts. The burning of bracken, for instance, would, I should have thought, affect very obviously the aspect and condition of the land.

Counsel for the National Trust during the hearing was driven to admit that the placing of a basket for litter on a short pole, or a seat or a bench, would amount to a breach of the condition. It is to be noted that it is both the aspect and the condition of the land which must be injured prejudiced affected or destroyed. What does "aspect" mean?—presumably the appearance, but viewed from what point? If a man chooses to stand with his eye against one of these poles, quite obviously he would be able to see nothing of the land, but that cannot be what is meant. What does "condition" mean? I construe that as referring to the presence or absence of cultivation. How do these poles affect the condition of the land?—it remains just the same as before. My garden remains a garden, even though the post office put up a telegraph pole on it.

The fact is that, in my judgment, the omission of any criterion by which these vague and uncertain words can be brought under some control is fatal to the validity of the restriction. I think it is void for uncertainty; it is so vague that it is really impossible of apprehension or construction, and in my judgment is wholly unenforceable. But whether it be wholly unenforceable or not, in my view the erection of these poles does not come within the prohibition at all. They do, it is true, "affect" to some extent the "aspect" of the land, but how and to what extent they affect the "condition" of the land I really fail to see. The land remains in the condition now in which it was before the poles were erected, except possibly in regard to the few square inches on which the poles stand. The land remains open country, heath, or scrub, exactly as it was before the poles were put up there; and this quite extraordinary combination of "aspect" and "condition" seems to me to indicate some interference with the land, both in its appearance and in its condition, which what has been done, and what it is proposed to do, do not come anywhere near satisfying.

If, however, I am wrong both as to the unenforceability of the condition, and as to the absence of any relevance in its terms to what has actually happened, there is the further difficulty as to how any restriction so worded can be said to benefit or protect Midsummer Hill. The nearest of these poles to Midsummer Hill

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is at least 1,100 yards distant from it. No doubt the poles are visible from Midsummer Hill on a reasonably clear day, but the effect of their presence or absence from the landscape must be infinitesimal.

I may here observe that the National Trust has now obtained statutory powers to impose and enforce restrictions in gross, but the present case is not within those powers. I have here to deal with the ordinary case of protected and restricted land assuming, contrary to my view, that the common lands have been validly restricted by the deed of April 28, 1936. I think that Midsummer Hill has not been validly protected in the circumstances, and it is only as the owners of Midsummer Hill that the National Trust can have any right of action in respect of these covenants.

If I am wrong on all these points, the further question arises whether the first defendants—that is to say the Electricity Board—have acted within and are proposing to act within their statutory powers, and are thereby relieved from any obligation to observe the restrictions, and excused for any breach of them which the erection of these poles would otherwise entail. In my judgment this question must be answered in the affirmative.

In their defence, the Electricity Board claim that by virtue of the provisions of the Electricity Act, 1947, and of those provisions of preceding Acts which are incorporated therein, and pursuant to consents of the Minister of Fuel and Power dated respectively September 14 and 26, 1951, they have statutory power to place electricity poles on and above the common lands in the position shown on the plan, and they say that they will refer to such consents for their full meaning and intendment. They further say that, if it is necessary, they have in fact obtained the express consent of the rural district council of Upton-upon-Severn.

The statutory justification for what the Electricity Board have done, are doing and are proposing to do has to be ascertained from the actual terms of the legislative enactments. These are very largely what is called referential legislation, and are certainly not too easy to follow. In the circumstances, I do not propose to examine with any great degree of particularity the foundation and nature of these statutory powers. Counsel were good enough to refer me to a very large number of sections which are relevant in this connexion, and I will first mention section 17 of the Electric Lighting Act, 1882, which is to this effect: "Compensation for damage. In the exercise of the powers in relation to the execution of works given them under this Act, or any

“ licence, order, or special Act, the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation in case of difference to be determined by arbitration.” It is not denied that the National Trust has or may have some right to be compensated under that section, which is still in force, although the amount of compensation which they are likely to recover, and the grounds on which their claim can be based, do not at the moment concern me. I merely state in passing that I think that the Electricity Board are justified in having pleaded as they do in their defence that, under that section, a remedy by way of compensation is provided for damage (if any) sustained as a result of the exercise by them of their powers, and that no other remedy is available to the plaintiffs. I am, of course, familiar with the principles laid down in the case of *Shelfer v. City of London Electric Lighting Co.*,¹² which limits to some extent the grounds on which such damage can be claimed, but that in my judgment is a matter with which I am not here concerned.

Next I want to refer to para. 1 of the schedule to the Electric Lighting (Clauses) Act, 1899, which directs that the provisions of that schedule are to be read and construed in all respects subject to the provisions of, inter alia, the Electricity Act, 1947. Those Acts and parts of Acts are in this schedule collectively referred to as “ the Principal Act,” and then follow a certain number of definitions. Following on that, there is a section or paragraph of a section to which some attention has been drawn, which is para. 10 (b) of that schedule. That provides: “ The undertakers ”—that is to say the Electricity Board—shall not without the express consent and authorization of the Minister of Fuel and Power and the express consent of the local authority also “ place any electric line above ground except within premises in “ the sole occupation or control of the undertakers. . . .” A curious point arises there, because by section 57 (2) of the Electricity Act, 1947, it is enacted: “ The schedule to the Electric Lighting (Clauses) Act, 1899, shall, as from the vesting date, “ be incorporated with this Act, and shall have effect, as so “ incorporated, subject to the adaptations and modifications “ specified in Part III of the said Fourth Schedule.” But before

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that enactment took effect, section 21 of the Electricity (Supply) Act, 1919, had come into operation and is now binding on and can be taken advantage of by the Electricity Board. The section provides: "Where the consent of the Board of Trade"—now the Minister of Fuel and Power—"is obtained to the placing of "any electric line above ground in any case, the consent of the "local authority shall not be required, anything in the Electric "Lighting Acts, or in any order or special Act relating to the "undertaking to the contrary notwithstanding. . . ." The effect of those enactments, in my judgment, is to excuse the Midlands Electricity Board in the present case from obtaining the consent of the appropriate local authority, which is in point of fact the Upton-upon-Severn Rural District Council.

But supposing I am wrong in that, then I hold that express consent has been given by virtue of two letters written by the clerk of that authority to the chairman of the Electricity Board, and dated October 26, 1950, and March 30, 1951. [After reading the letters his Lordship continued:] I hold first, therefore, that the consent of the rural district council was not required under the provisions of the Acts as they stand; but secondly, that if it was required, then I think that it has been given in sufficiently express terms.

Section 9 of the Electricity Act, 1947, relates to the compulsory purchase of land and provides: "The Minister may authorize "any Electricity Board to purchase compulsorily any land which "they require for any purpose connected with the discharge of "their functions," and then the Acquisition of Land (Authorization Procedure) Act, 1946, with an immaterial exception, is to apply. That section obviously deals with an entirely different matter. First of all, it may well be that "land" includes easements, and indeed the second subsection of that same section expressly so states. But this is not a compulsory purchase at all, and in my judgment section 9 in no way limits the generality of the provisions to which I am now about to refer, that is to say, sections 21 and 22 of the Electricity (Supply) Act, 1919, which is incorporated in the Act under which the Electricity Board in this case are acting. Section 21 of the Act of 1919 is in these words: "Where the consent of the Board of Trade"—that is now the Minister—"is obtained to or for the placing of any electric "line above ground in any case, the consent of the local authority "shall not be required, anything in the Electric Lighting Acts, or "in any order or special Act relating to the undertaking to the "contrary notwithstanding, but the Board of Trade before giving

“their consent shall give the local authority an opportunity of
“being heard.”

I come now to section 22. [His Lordship read subsection (1) down to the beginning of the proviso to that subsection and continued:] Now what does “otherwise lawful” mean? In my judgment, it means in every case in which there is not some direct infringement of some statutory power, or some obviously wrong and illegitimate use of this power—such, for instance, as putting electric cables too low down across a footpath or river, road or railway, and I do not think that it is possible to regard those words “otherwise lawful” as referring to the private rights of any particular individual.

We come now to the proviso: “Provided that, before placing
“any such line across any land, the joint electricity authority or
“undertakers shall serve on the owner and occupier of the land
“notice of their intention, together with a description of the
“nature and position of the lines proposed to be so placed; and
“if, within 21 days after the service of the notice, the owner and
“occupier fail to give their consent or attach to their consent any
“terms or conditions or stipulations to which the joint electricity
“authority or the undertakers object, it shall not be lawful to
“place the line across that land without the consent of the Board
“of Trade,” now the Minister. I thought at one time (and I now reject the idea) that it could be argued that the owner and occupier of these common lands consisted of the combination of all persons whose consent is necessary in order to convey the unencumbered and unrestricted fee simple of the property to another person; in other words that it would include the Church Commissioners for the purpose of dealing with the freehold, and the National Trust for the purpose of releasing their right or easement, assuming that such a right exists, and that the two would be co-owners for the purpose of this proviso. I do not think that possible.

I think that the objection which was taken—that no proper notice had been served on the National Trust—is a false point, and I do not think there is anything in it at all. But then the proviso goes on thus: “and the Board of Trade”—that is now the Minister—“may, if after giving all parties concerned an
“opportunity of being heard they think it just, give their consent
“either unconditionally or subject to such terms, conditions, and
“stipulations as they think just; and in deciding whether to give
“or withhold their consent, or to impose any terms, conditions, or
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“ underground) the Board shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed.” At one time the Electricity Board took the view that the National Trust, in their capacity of persons entitled to enforce these restrictions, was not a “ party concerned ” to whom opportunity should be given. In my judgment, that view is wrong. Assuming, of course, that the restrictions are valid, and that the National Trust are in a position to enforce them, then I think in that respect they are “ parties concerned ” who should have been heard. No harm has been done in this case, because in fact they were heard at the inquiry which took place previous to the sanction by the Minister of this scheme, but I put it on record that, in my view (so far as the point is material in the present case) persons entitled to enforce restrictive covenants for land are “ persons concerned ” to whom an opportunity of being heard should be given. But as I have said, the National Trust were heard, and there, so far as I can see, is the end of the matter.

Here I would observe that one of the considerations to which the Minister had to direct his mind was the amenities of the land, and I do not believe for a single moment that that consideration was left out of the calculations of the Minister. I do not wish it to be thought that, in carrying out the statutory powers and performing the statutory powers under these Acts, the question of the amenities either ought to have been or was disregarded. Here in the statute itself is the direction that that matter has to be kept in mind; and I have no reason at all to suppose that it was not kept in mind on the present occasion.

The attitude of the second defendants, the Church Commissioners, is very clearly stated in the defence which they have delivered. They say that the acts of the Electricity Board of which complaint is made are undertaken by the Electricity Board without any legal licence of the Church Commissioners, but that the consent of the Minister of Fuel and Power was given in the month of September, as I have already mentioned. They say: “ By reason of such consent it became unlawful and is now unlawful for the second defendants to restrain the first defendants from committing the said acts or any of them and so far as such acts or any of them constitute a breach of the covenants given by the second defendants and more particularly referred to in para. 2 of the statement of claim the second defendants ” —that is the Church Commissioners—“ are discharged from observing and performing such covenants.” They say further

that they "are now and have at all material times been ready and willing to observe and perform the said covenants so far as it shall remain lawful for the same to be observed and performed by the second defendants."

If the earlier part of this judgment is accurate, then the covenants are not such as to be binding either in law or in equity; but that is a matter which I decide only as between the parties to this action, leaving the National Trust and the Church Commissioners to regulate the position in any way they may choose, that is to say, as regards other questions which may arise in respect of the covenants. So far as the present litigation is concerned, I do not think that the position is capable of any alteration or adjustment.

The position of the owners of easements has been sufficiently explained in such cases as *Clark v. School Board for London*¹³; in *Kirby v. School Board for Harrogate*,¹⁴ and in *Metropolitan Asylum District v. Hill*.¹⁵

On all the points to which I have referred I am bound to hold that this action fails, and must be dismissed.

Solicitors: *A. A. Martineau; Sydney Morse & Co., for S. P. Wilson; Milles, Day & Co.*

J. L. D.

¹³ (1874) L.R. 9 Ch. 120.

¹⁵ 6 App.Cas. 193, 202.

¹⁴ [1896] 1 Ch. 437.

In re COUCHMAN.

COUCHMAN AND ANOTHER *v.* ECCLES AND OTHERS.

[1950 C. 3253]

DANCK-
WERTS J.

1952
Feb. 5.

National Health—Hospital—Institution for the "reception and treatment" of persons—Will—Legacy and gift of residue to orthopaedic clinic—National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81), s. 79.

The testator by his will dated May 22, 1939, directed his trustees after the death of his wife to pay a legacy of £100 to the Leominster Orthopaedic Clinic and to stand possessed of his residuary estate on trust to divide it into four equal shares and to pay one such share

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

VAISEY J.

1951

NATIONAL
TRUST FOR
PLACES OF
HISTORIC
INTEREST OR
NATURAL
BEAUTY
v.
MIDLANDS
ELECTRICITY
BOARD.

DANCK-
WERTS J.

1952

COUCHMAN,
In re.
COUCHMAN
v.
ECCLES.

to the Leominster Orthopaedic Clinic. The testator died on January 9, 1941, and his widow died on June 8, 1949.

The clinic, a voluntary institution, founded after the war of 1914-18, provided after-care treatment, and was affiliated to the Herefordshire branch of the British Red Cross Society and later became a unit of it. The work was carried on in a hut belonging to and in the grounds of the Robert Jones and Agnes Hunt Orthopaedic Hospital. The society paid a small annual sum for the use of the hut. A scheme approved by the Minister of Health was set up under which the Robert Jones and Agnes Hunt Orthopaedic Hospital Management Committee were the hospital management committee for the purposes of the National Health Act, 1946, in respect of this clinic. The Act came into force on July 5, 1948, and since that date the Herefordshire branch of the British Red Cross Society had not as such been concerned with the work of the clinic, which had been carried on by that management committee.

By the present summons the trustees of the will asked whether the legacy of £100 and the share of residue were payable (a) to the Herefordshire branch of the British Red Cross Society, and if so whether on any and what trusts; or (b) to the Robert Jones and Agnes Hunt Orthopaedic Hospital Management Committee by virtue of the Act of 1946; or (c) on some other, and, if so what trust:—

Held, (1) that the gift was not a gift to the branch of the British Red Cross Society in question, but was a bequest for a charitable purpose described in the will as the "Leominster Orthopaedic Clinic"; (2) that, although the clinic was an institution for the treatment of persons suffering from illness within the meaning of section 79 of the Act, it was not an "institution for the . . . reception" of such persons—which implied receiving persons as inmates thereof—nor was it "maintained in connexion with" this orthopaedic hospital or any particular hospital, and accordingly the clinic was not within the definition of "hospital" contained in the Act, and therefore this gift was not caught by any of its provisions; (3) that accordingly, the funds in question were payable by way of scheme to the hospital management committee on trust to apply them for the purposes of the Leominster Orthopaedic Clinic.

ADJOURNED SUMMONS.

The testator by his will, dated May 22, 1939, directed his trustees after the death of his wife to pay a legacy of £100 to the Leominster Orthopaedic Clinic and to stand possessed of his residuary estate on trust to divide it into four equal shares and to pay one such share to the Leominster Orthopaedic Clinic. These bequests amounted to about £1,250. The testator died on January 9, 1941, and his widow died on June 8, 1949. The National Health Service Act, 1946, came into operation on July 5, 1948.

After the war of 1914-18 a number of persons founded a scheme for the after-care of patients in the county of Hereford

who had been treated at Oswestry and other hospitals. A committee set up to run the clinic was first affiliated to the Herefordshire Branch of the British Red Cross Society, and later became a unit of it. The clinic was conducted in a hut belonging to and in the grounds of the Robert Jones and Agnes Hunt Orthopaedic Hospital. A small annual sum was paid to the hospital for the use of the hut, patients connected with the hospital were treated at the clinic, and the services of nurses and surgeons were obtained from the hospital, but patients other than those connected with the hospital were treated at the clinic.

When the National Health Service Act came into operation a scheme was prepared and approved by the Minister under which the Robert Jones and Agnes Hunt Orthopaedic Hospital was formed into a special group, and the Leominster Orthopaedic Clinic was treated as being included in that group. The Red Cross Committee held a final meeting and purported to dispose of the small amounts of funds which they had in their hands in connexion with the clinic.

By the present summons the trustees of the will asked whether the legacy of £100 and the share of residue were payable (a) to the Herefordshire branch of the British Red Cross Society, and if so whether on any and what trusts; or (b) to the Robert Jones and Agnes Hunt Orthopaedic Hospital Management Committee, by virtue of the Act of 1946; or (c) on some other, and, if so what trust.

J. A. Armstrong for the plaintiffs.

G. T. Hesketh for the director of the defendant branch of the British Red Cross Society. The proper recipient of this gift is the defendant branch of the British Red Cross Society, which carried on the work of the clinic. The gift is not caught by any of the provisions of the National Health Service Act, 1946, because the work carried on in the hut did not come within the definition of "hospital" contained in section 79¹ of the Act, for the following reasons:—(a) The clinic was not an "institution" for the "reception" of persons suffering from illness; the word "reception" implies taking persons into a building and keeping

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VERTS J.

1952

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¹ National Health Service Act, 1946, s. 79: "'hospital' means any 'institution for the reception and treatment of persons suffering from illness or mental defectiveness . . . and any institution for the recep-

'tion and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics . . . maintained in connexion with any such institution . . . as aforesaid.'

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WERTS J.

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them there, but the evidence establishes that persons came to the hut for treatment for very short periods of time, e.g., half an hour or an hour; (b) even if the clinic was a "clinic" within the meaning of the section it was not carried on in connexion with any particular institution as defined above.

[His Lordship stated that he was satisfied that this gift was not payable to the Herefordshire branch of the British Red Cross Society.]

F. E. Skone James for the defendant Hospital Management Committee. The clinic is now run by the management committee and they are entitled to this gift by virtue of sections 6 and 60² of the Act. The clinic comes within the definition of hospital contained in section 79. The word "reception" in section 79 means no more than receiving out-patients, which is part of the normal routine of most hospitals. Further, to come within the section the clinic need not be under the sole control of any particular hospital; the language is very wide: "maintained in "connexion with."

Denys Buckley for the Attorney-General. This gift is not caught by any of the provisions of the National Health Service Act, 1946. Section 60 does not apply; it only applies where section 6 applies. In the present case section 6 cannot possibly apply, for, at the most, the interest which the British Red Cross Society had in this hut was a licence. Further, the clinic does not fall within the definition of "hospital" contained in section

² National Health Service Act, 1946, s. 6: "(1) Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital, . . . and in equipment, furniture or other movable property used in or in connexion with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital. . . ."

s. 60: "(1) Where property, other than property transferred to the Minister or to the board of governors of a teaching hospital or to a hospital management committee under s. 6 or s. 7 of this Act, is held on trust immediately before

"the appointed day, and the terms of the trust instrument authorize or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorizing or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose of making payments, whether of capital or income— . . . (b) in the case of any other hospital [i.e., not a teaching hospital] to the regional hospital board for the area in which the hospital is situated or to the hospital management committee for the hospital or for the group of hospitals in which it is comprised."

79; the word "reception," it is submitted, imports that persons are to be received into the hospital as inmates thereof; "maintained in connexion with" means "carried on as part of the hospital's own operations," which this clinic undoubtedly was not.

This is a gift for a charitable purpose and it will not fail simply by reason of the fact that a different body of persons is administering the charity than that contemplated by the testator. It is suggested that these funds should be paid by way of scheme to the Robert Jones and Agnes Hunt Orthopaedic Hospital Management Committee on trust to apply them for the purposes of the Leominster Orthopaedic Clinic.

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DANCKWERTS J. [having stated the facts]:—The question that I have to decide is how this legacy and share of residue bequeathed by the testator's will should be treated in these circumstances. The first defendant claims to be entitled to the funds representing the bequest on behalf of the Herefordshire Branch of the British Red Cross Society. So far as that claim is concerned, I have come to the conclusion that the gift is not to the branch of the Red Cross Society in question in any way. It is, in my view, a bequest for a charitable purpose which is described in the will as the "Leominster Orthopaedic Clinic."

The next claim is by the Robert Jones and Agnes Hunt Orthopaedic Hospital Management Committee who claim to be entitled by virtue of the provisions of the National Health Service Act, 1946, and in particular under section 60. It is contended on behalf of that body that either the clinic was a hospital for the purposes of the Act, or that it was a clinic maintained in connexion with the hospital they now represent and therefore included in the term "hospital" under the Act and that the funds are payable to the present Management Committee by virtue of sections 6 and 60 of the Act of 1946.

Section 79 contains a definition of "hospital," and "hospital accommodation" is mentioned in section 3 (1) as being one of the services which are to be provided by the Minister of Health.

It was argued first that the clinic was a hospital within the meaning of this definition. Was it an institution for the reception and treatment of persons suffering from illness? Certain words are not very clearly defined, but I think "institution" means something which is set up and possibly the clinic was something which was set up. Was it for the reception and treatment of persons suffering from illness? It was plainly for the

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In re.
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v.
ECOLLES.

purposes of treatment of persons suffering from illness. As to "reception", it is said that that merely means that a person shall be received at a particular place and there treated.

It has been argued, on the other hand, that "reception" means more than that, that it means taking people into a building and keeping them there, as is normally done at a hospital.

In my opinion that is the appropriate meaning to be applied to this definition. It is not satisfied merely by some form of treatment at a dispensary or clinic or out-patients department. It is to be observed that those outside activities are added to the definition of "hospital" under a different part of the definition section. Accordingly, I conclude that this particular institution, if that be the correct term to apply to it, is not one for the reception and treatment of persons suffering from illness.

It was then argued that it was a clinic maintained in connexion with the Orthopædic Hospital. Although the clinic treated patients connected with that hospital and although the services of nurses and surgeons were obtained from that hospital and the hut was the property of that hospital, it was not a clinic which was maintained in connexion with that hospital. In my judgment it was maintained for the purpose of attending to persons who required subsequent treatment, persons coming from any hospital would have been treated—they might, in fact, have come from another county—or they might not be connected with any hospital at all. It was a clinic which was maintained for the purpose of treating persons in a particular way, but not maintained in connexion with any particular hospital. Accordingly, it does not seem to me to come within the definition of "hospital" contained in section 79 of the Act.

I come to the conclusion therefore that the clinic is not included in the terms of the National Health Service Act, 1946.

There remain funds which are held on trust for a particular purpose denoted in the will, and that purpose may still be carried on by a different body; it may be carried on by the management committee, but it is not a gift to the management committee of the Orthopædic Hospital. It is a charitable trust which would not fail even if the purpose had come to an end by a disbandment of the committee. It will therefore be carried out by means of a scheme. Whether it will be correct to call it a *cy-près* application or simply a scheme for the carrying out of the original purpose does not matter in this particular case.

It has been suggested by Mr. Buckley, on behalf of the Attorney-General, that the appropriate scheme would be to direct payment of the funds to the Robert Jones and Agnes Hunt Orthopædic Hospital Management Committee on trust to apply those funds for the purpose of the Leominster Orthopædic Clinic. There will be a direction to that effect by way of scheme.

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Declaration accordingly.

Solicitors: *May, May & Deacon, for Lloyd & Son, Leominster; Edwin Coe & Calder Woods, for David Allen & Carver, Hereford; Sharpe, Pritchard & Co., for T. H. Waterhouse, Edgbaston; Treasury Solicitor.*

In re NORTH, DECD. NORTH *v.* CUSDEN.

WYNN-
PARRY J.

[1951 N. 1947]

1952
Feb. 27.

Will—Construction—Gift to devisees conditional on payment of weekly sum in equal shares—Joint tenancy or tenancy in common.

A testator by his will devised and bequeathed to his two sons W. L. N. and J. H. N. certain specified properties, "or if sold . . . the balance of the proceeds of such sale . . . on condition "that they agree to pay in equal shares to my wife . . . for the "remainder of her life after my decease the sum of 10s. per week." The testator died on May 21, 1937, leaving his wife and two sons surviving him. J. H. N. died on January 1, 1951. On the hearing of a summons taken out to have determined the question whether the interest of the sons was a joint tenancy or a tenancy in common:—

Held, that the effect of the condition was to make the sons tenants in common, for it created a personal obligation on each of them, which was a factor sufficient to indicate that their interest was not a joint tenancy.

Kew v. Rouse (1685) 1 Vern. 353 applied.

ADJOURNED SUMMONS.

The testator, by a home-made will dated February 3, 1936, after appointing his two sons William Leonard North and John Henry North to be his executors, devised and bequeathed to them

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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two properties, which were specified, “(or if sold during my “ lifetime such balance of the proceeds of such sale as is in my “ possession at the date of my death) in each case subject to any “ mortgage that may be charged on such property at the date of “ my death On condition that they agree to pay in equal shares “ to my wife Mary Emily North for the remainder of her life after “ my decease the sum of 10s. per week.” The testator died on May 21, 1937, and after his death the two sons paid to the widow the sum of 10s. as specified in the will. John Henry North died on January 1, 1951.

The present summons was taken out to have determined the question whether the interest of the sons was a joint tenancy or a tenancy in common.

B. L. Bathurst for the plaintiff, the surviving son and executor of the testator.

J. A. Brightman for the defendant, the personal representative of the estate of the deceased son.

The arguments sufficiently appear from the judgment.

WYNN-PARRY J. The question which I have to decide arises on a home-made will, the relevant part of which is contained in the bequest by the testator to his two sons, William Leonard North and John Henry North, of two properties, which are specified, “(or if sold during my lifetime such balance of the “ proceeds of such sale as is in my possession at the date of “ my death) in each case subject to any mortgage that may be “ charged on such property at the date of my death.” If the matter stopped there, no doubt it would be very difficult to come to any other conclusion than that on its true construction, that provision created a joint tenancy in favour of the two sons, because up to that point it is difficult to discover any context which could produce the result that there was a tenancy in common as opposed to a joint tenancy. The will continues: “On condition that they agree to pay in equal shares to my wife “ Mary Emily North for the remainder of her life after my “ decease the sum of 10s. Od. per week.”

The debate has really turned on the question whether the language of that condition is sufficient to provide the necessary context to convert the interest of the sons into a tenancy in common instead of a joint tenancy. As was pointed out by Mr. Brightman on behalf of the defendant, Lord Hatherley L.C., in

Robertson v. Fraser,¹ said: "I cannot doubt, having regard to the authorities respecting the effect of such words as 'amongst' and 'respectively,' that anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy, and to create a tenancy in common. Perhaps it would have been well if the courts had held that in bequests, as in partnerships, every community of interest was to be considered a tenancy in common."

Having regard to the context in which those words were used in that judgment, in my view Lord Hatherley was intending his remarks to be of general application, and they were designed to do no more than to state what he regarded as an existing well-established general rule.

The question then arises: do these words "on condition that they agree to pay in equal shares to my wife" constitute a sufficient pointer to the conclusion that the gift created a tenancy in common? Mr. Brightman pointed out, it being conceded that their effect was to create a personal obligation on each of the sons, that if any other conclusion were arrived at than that the interest of the sons in the property was a tenancy in common, the odd result would arise that on the death of one of them—and it is the death of John Henry North that has raised this question—the interest in the property would be vested solely in the survivor, whereas the estate of the deceased would be, or might continue to be, liable to make the one half of the weekly payment to the widow. In my opinion that result enables me to say that on its true construction the interest of the two sons in the property was a tenancy in common and not a joint tenancy.

As Mr. Brightman rightly remarked, in a case involving the construction of a will authorities are seldom of any direct help, apart from the expression of some general principle; but his researches have led to his citing the very old case of *Kew v. Rouse and his Wife*,² in which the facts are almost on all fours with the facts in this case. The report is extremely short: "The plaintiff's wife, whose administrator he is, and the defendant's wife were the two daughters of Elizabeth Wise, who being possessed of a term for years, in April, 1679, devised that term and all her interest therein unto her two daughters, they paying yearly to her son £25 by quarterly payments, namely, each of them £12 10s. Od. yearly out of the rents of the premises during his life, if the term so long continued. The plaintiff's wife

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¹ (1871) L.R. 6 Ch. 696, 699.

² (1685) 1 Vern. 353.

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“being dead, the defendant claims the whole by survivorship;
“and whether it was a joint tenancy or a tenancy in common
“was the question. The Lord Chancellor [Lord Jefferies] con-
“ceived it clearly to be a tenancy in common; for that £25 per
“annum was to be paid by the two daughters equally in
“moieties; and decreed an account of the moiety of the profits
“to the plaintiff, as administrator to his wife.”

The only suggested ground of distinction was that in the devise the direction to pay was to pay out of the rents of the premises, but that does not appear to me to form a sufficient ground for any attempted distinction between that case and this, because in both cases the obligation was a personal obligation on each of the devisees. Indeed, from the very short report of the ground on which the Lord Chancellor based his decree it would not appear that he necessarily rested any weight on the circumstance that the £25 was to come out of the yearly rents. The language of the report is “for that £25 per annum was to be paid
“by the two daughters equally in moieties.” If, therefore, any authority were required to support the conclusion at which I arrive as a matter of construction and plain common sense, it is to be provided by that authority.

I therefore propose to declare that on the true construction of the will the interest of the two sons was a tenancy in common, not a joint tenancy.

Declaration accordingly.

Solicitors: *Payne, Hicks Beach & Co., for Day & Son, St. Ives, Huntingdon; Field, Roscoe & Co., for Batten & Whitsed, Peterborough.*

VAISEY J.

1952

Jan. 30.

In re BOUVERIE, DECD.

BOUVERIE AND ANOTHER *v.* MARSHALL AND ANOTHER.

[1951 B. 5062.]

Followed. *In re*
WOOD'S WILL
TRUSTS
[1952] 1 Ch. 406

Will—Name and arms clause—Validity—Uncertainty—Tenant for life not to “disuse” name or arms.

A testator, by his will, settled certain freeholds on condition that any life tenant or (in the case of a married woman) her husband, should within one year of becoming entitled in possession assume the surname of B., and apply to bear the arms of P. B.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law]

and that if the person so entitled or in the case of a married woman her husband should "at any time afterwards disuse such "surname . . . or disuse such arms" certain gifts over were to take effect:—

Held, that the word "disuse" was not of that high degree of certitude and precision which was required of a condition subsequent, and that accordingly, the condition was void for uncertainty, it being impossible to ascertain either prospectively or retrospectively the precise moment of time at which the disuse of the name or of the arms brought the gift over into effect.

Clavering v. Ellison (1859) 7 H.L.C. 707; *Sifton v. Sifton* [1938] A.C. 656 and *Clayton v. Ramsden* [1943] A.C. 320, applied.

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1952

BOUVERIE,
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ADJOURNED SUMMONS.

The testator, H. H. P. Bouverie, who died on December 12, 1925, by clause 8 of his will dated February 10, 1925, devised all his lands, messuages and hereditaments in the county of Somerset ["the settled freeholds"], now represented by capital moneys, to trustees to the use of his nephew, P. H. P. Bouverie, for life, with remainder to the use of the nephew's sons successively in tail male and in tail with remainder to the use of the nephew's daughters successively in remainder one after the other in tail male and in tail. By clause 9 a person born in the lifetime of the testator taking an interest either in tail male or in tail under clause 8 had his or her interest cut down to a life interest.

Clause 10 provided: "Every person who shall under the "limitations herein contained become entitled as tenant for life "or tenant in tail male or in tail by purchase to the possession "or the receipt of the rents and profits of the settled freeholds "other than a person who shall then use the surname of Bouverie "of Pleydell Bouverie and bear the arms of Pleydell Bouverie "and other than a person who would forfeit another estate by "complying with this provision shall within one year after he or "she shall so become entitled. . . . And also the husband of "every female so becoming entitled not being a peer or the heir "apparent or presumptive to a peer or a person who would forfeit "another estate by complying with this provision shall within "one year after such female shall so become entitled or marry "whichever shall last happen assume the surname of Bouverie "either with or without his or her proper surname and apply for "proper authority to bear the arms of Pleydell Bouverie either "alone or marshalled with his or her own arms. . . . And if the "person so entitled as aforesaid or in the case of a married woman "her husband shall refuse or neglect within such year to assume "such surname or to apply for authority [to use such arms] or

VAISEY J. 1952 BOUVERIE, DECD., <i>In re.</i> BOUVERIE <i>v.</i> MARSHALL.	" shall at any time afterwards disuse such surname from cause " other than becoming a peer or peeress or becoming entitled to " use and using by courtesy the title of a peer or peeress or shall " at any time after obtaining such authority disuse such arms " then and in every such case immediately after the expiration " of such year or such disuser . . ." the interest of such person was to determine and certain substituted limitations were to take effect.
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The nephew survived the testator and died on April 30, 1951, leaving issue three daughters, of whom the eldest took a life interest under the will. She married on March 19, 1949, her present husband, J. Marshall, and there was issue of the marriage one son, who, under the substituted limitations of clause 9 of the will, was now tenant in tail expectant upon his mother's life interest.

The trustees of the will took out the present summons to have determined the question whether the condition in clause 10 was binding on Mrs. Marshall, the present tenant for life.

John Sparrow for the trustees.

W. P. Graetz for the tenant for life. The condition contained in clause 10 is void for uncertainty: see *In re Lewis' Will Trust*.¹ It is impossible to ascertain the precise moment of time when the name or the arms fall into disuse. The word disuse has no precise meaning, and, this being a defeasance clause, must be construed strictly. Further, the condition is bad as offending against public policy; it applies to both husband and wife and is likely to lead to friction between the spouses if the husband refuses to change his name in compliance with the provisions of clause 10, and the wife thereby is forced to suffer a forfeiture.

Peter Foster for the infant remainderman. The "name and arms" clause is valid. *In re Lewis' Will Trust*² is distinguishable, for in that case, unlike the present, it does not appear from the name clause when the gift over was to take effect. The word "disuse" is not imprecise; "disuse" is equivalent to "non-use." It is difficult to differentiate "disuse" from "discontinue to use," and the main precedent books use either the one phrase or the other. If, therefore, the word "disuse" is held to be uncertain in its operation, the result will be that all name and arms clauses which follow Davidson's Precedents and Forms in Conveyancing, or Key and Elphinstone's Precedents in Conveyancing, will be void.

¹ [1951] W.N. 591.

² [1951] W.N. 591.

In *In re Cornwallis*,³ where a "name and arms" clause was held to be valid, the clause contained the phrase "discontinue to use," but it was not suggested that the clause was void for uncertainty on that account. [He also referred to *Sifton v. Sifton*.⁴]

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VAISEY J. [having stated the facts]:—The question I have to decide is as to the validity of a "name and arms clause," as it is popularly called. I have had to consider this matter on two occasions, first in *In re Fry*,⁵ and then in *In re Lewis' Will Trust*.⁶ This case in a way is simpler, because of the two points which arose in the two previous cases only one emerges here. It depends on the certitude or otherwise of the one word "disuse." If this condition subsequent is to be operative at all, it must be certain as to its operation. There must be no doubt on the question whether at any given moment of time the condition has or has not taken effect, the condition in question being the disuse of the arms and the disuse of the name. In my judgment, although the meaning of the word "disuse" is sufficiently plain in the colloquial sense, it is more than doubtful whether it is of that high degree of certitude and precision which is required in the case of a condition subsequent, that is to say, a condition which takes away an estate previously conferred.

The leading authorities on the matter are those to which I referred in *In re Lewis' Will Trust*,⁷ that is to say, *Clavering v. Ellison*⁸; *Sifton v. Sifton*⁹; and *Clayton v. Ramsden*.¹⁰ I said in *In re Lewis' Will Trust*,⁷ and I say again, that the court should lean strongly against the defeasance clause unless the clause is drawn with the utmost and highest degree of certitude. The way Lord Romer put the matter in *Sifton v. Sifton* was this¹¹: "If the clause in question be in truth a condition subsequent . . . it can be of no validity unless, to use the words of Lord Cranworth, the court and, their Lordships venture to add, the parties concerned, can see from the beginning precisely and distinctly upon the happening of what event it is that the payments to the appellants are to cease." It seems to me that that observation is appropriate to the present case. Mrs. Marshall and her husband must be able, if this condition subsequent is

³ (1886) 32 Ch.D. 388.⁴ [1938] A.C. 656, 670, 674.⁵ [1945] Ch. 348.⁶ [1951] W.N. 591.⁷ [1951] W.N. 591.⁸ (1859) 7 H.L.C. 707.⁹ [1938] A.C. 656.¹⁰ [1943] A.C. 320.¹¹ [1938] A.C. 656, 675.

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effective, to see from the beginning precisely and distinctly on what event it is that her life interest is to be terminated. I am fully aware of the fact that these name and arms clauses have been used in accordance with well-known precedents for a great number of years, but, in my judgment, the cases to which I have alluded have put a very different complexion upon the manner in which conditions subsequent are approached. I am not, and I cannot indeed be, moved by the fact that my decision may affect a large number of other cases in which this particular point has not been taken.

Applying the test to the present case, I ask myself: can Mrs. Marshall, the first defendant, and can her husband, say precisely and exactly what they have to do or refrain from doing in order to prevent any transfer of her interest under the gift over? It does not require very much ingenuity to imagine a large number of borderline cases. Of course, if she ceased to use the name Bouverie altogether, and never used it again, never mentioned it, and never allowed it to be used in conjunction with her own name, then that would be an obvious case. But to what extent and for what period of time has the "disuse" referred to in the clause to take effect? Would it be a breach of it if from time to time Mrs. Marshall, having adopted the name of Bouverie for general purposes, occasionally referred to herself by her former name of Marshall, and occasionally gave that name when giving an order in a shop in London? How often would she have to omit the use of the word "Bouverie" to bring about the forfeiture for which the clause provides? What percentage short of 100 per cent. of the disuser of the name would amount to a disuser of it within the meaning of the clause?

Those are questions which, in my judgment, are simply incapable of being answered. If they are incapable of being answered, then it seems to me that this condition is not so framed as to satisfy the exacting requirements of the law as laid down in the cases to which I have referred. It is not a question of whether Mrs. Marshall unfortunately were to omit to use the name or to omit to use the arms on five occasions, ten occasions, or twenty occasions. That is not the criterion. In my judgment, one has to construe the uncertain and ambiguous and, if I may say so, slippery word "disuse." I quoted in *In re Lewis' Will Trust*¹² a sentence which I obtained from the Oxford English Dictionary, where the statement is made by Dean Swift

¹² [1951] W.N. 591.

"that he had disused family prayers for five years." I daresay he did. But at what moment of time would that disuse have caused the cesser of an estate limited to Dean Swift and given over in the case of his disuse of family prayers? The answer to that is, nobody can tell. The whole matter is completely uncertain.

Although, as Mr. Foster has pointed out, the word "discontinue" is probably in not much better case, I thought at one time that it was more descriptive of a single act than the word "disuse." I am, however, not at all certain that the word "discontinue" is not open to the same objection as the word "disuse," but I am not going to say anything about that, because that is not the word which is in question here.

I think that "disuse" is a word which signifies in a vague sort of manner the slipping of a custom and is not referable to a definite act, so as to enable anybody, either prospectively or retrospectively, to say on what day and at what moment this interest was forfeited.

It may be that this judgment will cast doubt on other cases of the same kind in which this point has never been raised. I hesitate to decide something which has such a far-reaching effect, but if I think, according to the law, that such is the effect of this word "disuse," I am bound to express my opinion about it and to decide this case in accordance with that opinion. In my judgment, it is not possible either prospectively or retrospectively to see the exact moment of time at which the disuse of the name or of the arms will occur to such an extent and to such a degree as would, on the true meaning of this will, cause the gift over to take effect.

I will declare therefore that the condition contained in clause 10 of the testator's will is void for uncertainty and therefore is not binding on the present tenant for life.

Declaration accordingly.

Solicitors: *Ellis, Piers & Co.*

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March 4.

[1951 W. 3317.]

Will—Condition subsequent—Name and arms clause—Forfeiture if beneficiary should “discontinue to bear and use” name and arms—Condition void for uncertainty.

A testator provided by his will that every person who should become entitled to certain specified interests should “assume and “use the surname and arms of W either alone or together with his “or her own surname and arms and that in case any such person “shall refuse or neglect within [a prescribed period] . . . to assume “and use such surname and arms or shall at any time afterwards “discontinue to bear and use such surname and arms” certain provisions for defeasance were to take effect.

Held, that the clause was void for uncertainty, as the phrase “discontinue to bear and use” was indistinguishable from the word “disuse,” which had been held void for uncertainty in *In re Bouverie* (ante, p. 400).

In re Bouverie, supra, followed.

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A testator, by a clause in his will, provided that every person, with the exceptions there specified, who should become entitled under the preceding provisions of the clause should “assume and “use the surname and arms of Wood either alone or together “with his or her own surname and arms and that in case any “such person shall refuse or neglect within [a prescribed period] “(unless prevented by death absence or unavoidable cause) to “assume and use such surname and arms or shall at any time “afterwards discontinue to bear and use such surname and “arms” certain provisions for defeasance were to take effect.

The summons was taken out by the executors of the will in order to ascertain whether the name and arms clause was valid.

Harold Lightman for the executors.

E. Blanshard Stamp for the first defendant. The name and arms clause is void for uncertainty. The phrase “discontinue to “bear and use” is indistinguishable from the word “disuse,” which was held by Vaisey J. in *In re Bouverie*¹ to render a similar clause void.

Peter Foster for the second and third defendants adopted the same argument.

¹ Ante, 400.

Wilfrid Hunt for other defendants. If *In re Bouverie*¹ is considered to be indistinguishable, it is submitted that it was wrongly decided, and should not be followed. The phrases employed in that case, and in this, have long been in general use by conveyancers, and it does not appear from the existing reports that that fact was called to the attention of the judge.

[*Foster*. I argued in *In re Bouverie*¹ in the same interest as Mr. Hunt, and I directed the attention of Vaisey J. to the books of precedents and the long established practice.]

The court should adopt two principles: (1) that it should endeavour to give effect to the plain intention of the testator; and (2) that it should not hold an expression void for uncertainty unless it is quite impossible to give it a meaning. [*In re Roberts*² was referred to.]

Clauses of this type containing the word "discontinue" have been long in use, and have been applied both to males and to females: see the second edition (1864) of Davidson's Precedents, at pp. 408 and 409. So the word has a "very good ancestry," and merits the support of the court on the ground that the long and unchallenged usage of conveyancers is of great weight, as was held in *In re Wilson's Will Trusts*,³ and in the appeal to the House of Lords in the same matter, *Bromley v. Tryon*.⁴

It is submitted that Vaisey J. in *In re Bouverie*⁵ did not adopt the right criterion, as laid down in *In re Wilson's Will Trusts*,⁶ that a document is not so vague and obscure to be unenforceable, merely because it presents difficulties of construction which make it desirable to have it construed by the court.

G. M. Parbury for other defendants in the same interest. I desire to adopt the arguments of Mr. Hunt. In *In re Cornwallis*⁷ a name and arms clause which contained the word "discontinue" was held to be good; although the present question was not then argued, that decision impliedly sanctions the use of the word. In *In re Lewis' Will Trusts*,⁸ a case decided by Vaisey J. shortly before *In re Bouverie*,⁹ he expressed the view that "discontinue" indicated an act more easily identifiable than "disuse," which was the word then in issue; he appears to have resiled somewhat from that view in *In re Bouverie*.⁹

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¹ Ante, 400.

² (1881) 19 Ch.D. 520.

³ [1950] W.N. 507; [1950] 2 All E.R. 955.

⁴ [1952] A.C. 265.

⁵ Ante, 400.

⁶ [1950] 2 All E.R. 955, 964.

⁷ (1886) 32 Ch.D. 388.

⁸ [1951] W.N. 591; [1951] 2 T.L.R. 1032.

⁹ Ante, 400.

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The word "discontinue" appeared in Hayes and Jarman's Precedents as long ago as 1869, and in Prideaux's Precedents at least since 1911.

WYNN-PARRY J. The nearest authority to the present case is the recent decision of Vaisey J. in *In re Bouverie*.¹⁰ In that case the name and arms clause was, except in one respect, for all material purposes similar to the one which I have to consider; the difference being that instead of the phrase "discontinue to bear and use," the verb "disuse" was employed; so that the relevant part of the clause read: "And if the person so entitled as aforesaid or in the case of a married woman her husband shall refuse or neglect within such year to assume such surname or to apply for authority to use such arms or shall at any time afterwards disuse such surname . . . then immediately after the expiration of the year or disuser" the provisions for defeasance were to take effect.

In the course of his judgment Vaisey J. considered certain prior authorities and, as I am informed by Mr. Foster who appeared in that case, had his attention drawn to the various editions of the books of precedents in which name and arms clauses appear, and he made this statement¹¹: "I am fully aware that these name and arms clauses have been used in accordance with well-known precedents for a great number of years, but, in my judgment, the cases to which I have alluded have put a very different complexion on the manner in which conditions subsequent are approached. I am not, and I cannot be, moved by the fact that my decision may affect a large number of other cases in which this particular point has not been taken." In the result, he held that the clause in question was void for uncertainty.

It has been urged on me that I am not bound by that decision because in the first instance the words which I have to construe are "discontinue to bear and use," whereas the word which Vaisey J. had to construe was the word "disuse"; and because in the second place he approached the problem from the wrong point of view. So far as the first point is concerned, Vaisey J. said¹²: "Although, as Mr. Foster has pointed out, the word 'discontinue' is probably in not much better case, I thought at one time that it was more descriptive of a single act than the word 'disuse.'" He was referring to an earlier decision

¹⁰ Ante, 400.

¹² Ibid. 405.

¹¹ Ibid. 404.

of his in *In re Lewis' Will Trusts*.¹³ "I am, however, not at all certain that the word 'discontinue' is not open to the same objection as the word 'disuse,' but I am not going to say anything about that because that is not the word which is here in question. I think that 'disuse' is a word which signifies in a vague sort of manner the slipping of a custom and is not referable to a definite act so as to enable anybody, either prospectively or retrospectively, to say on what day and at what moment this interest was forfeited."

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It has been very properly emphasized both by Mr. Hunt and by Mr. Parbury that the word used in *In re Bouverie*¹⁴ was different from that with which I am concerned. But I have heard no argument which persuades me that, in the context in which I find the phrase "discontinue to bear and use," I could give it any different meaning from that which Vaisey J. attributed to the word "disuse" in the context in which he had to consider that word.

I pass next to the criticism that Vaisey J. approached the case before him from the wrong point of view. It is perfectly true, as emerges so clearly from the judgment of Evershed M.R. in *In re Wilson's Will Trusts*,¹⁵ that the mere fact that "a document is difficult of construction is not the same thing as saying that it is so vague and obscure as to be unintelligible and, therefore, unenforceable." He continued: "It is a common event for these courts to have to construe provisions in wills and settlements, and it could not surely be said that a clause such as this failed in effect if it raised a point of construction such that it was thought desirable to take on it the opinion of the court." Later he said: "Suffice it for me to say that I am not satisfied that those points are of such obscurity that a court would be forced to say that the clause is so uncertain in expression as to be ineffective. I am strongly moved to that conclusion for the reasons which my brother has already mentioned, namely, the long and respectable ancestry which this particular clause has, deriving its origin from the early precedent of Mr. Davidson."

In the House of Lords, to which that case was taken sub nomine *Bromley v. Tryon*, Lord Simonds L.C. said¹⁶: "I come then to the point which was not argued before Harman J., but was chiefly relied on in the Court of Appeal and in this House,

¹³ [1951] W.N. 591; [1951] 2 T.L.R. 1032.

¹⁴ Ante, 400.

¹⁵ [1950] W.N. 507; [1950] 2 All E.R. 955, 964.

¹⁶ [1952] A.C. 265, 273.

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“viz., that the clause is altogether void for uncertainty. It is
“a question which I must approach with this familiar principle
“in the foreground of my mind, that, where a vested estate is
“to be defeated by a condition on a contingency that is to
“happen afterwards, that condition must be such that the court
“can see from the beginning, precisely and distinctly, on the
“happening of what event it was that the preceding vested
“estate was to determine.” I accept the view that the guidance
to be found in those passages is, that the proper approach to a
question such as this is not what questions must a party ask
himself or herself, or what difficulties may face that party on
reading the will, but whether or not the court can, upon con-
sideration of the clause, attribute to it a sufficiently precise
meaning. It is said that Vaisey J. failed to apply that test.
The relevant passage in his judgment in *In re Bouverie* is as
follows¹⁷: “Applying the test to the present case, I ask myself:
“can Mrs. Marshall, the first defendant, and can her husband, say
“precisely and exactly what they have to do or refrain from doing
“in order to prevent any transfer of her interest under the gift
“over?” If the passage stopped there, then indeed there would
be force in the criticism that the judge was looking at the
problem through the eyes of the persons concerned and not
through his own eyes. But he goes on: “It does not require
“very much ingenuity to imagine a large number of borderline
“cases. Of course, if she ceased to use the name *Bouverie*
“altogether, and never used it again, never mentioned it, and
“never allowed it to be used in conjunction with her own name,
“then that would be an obvious case. But to what extent and
“for what period of time has the ‘disuse’ referred to in the
“clause to take effect? Would it be a breach of it if from time
“to time Mrs. Marshall, having adopted the name of *Bouverie*
“for general purposes, occasionally referred to herself by her
“former name of Marshall, and occasionally used that name
“when giving an order in a shop in London? How often would
“she have to omit the use of the word ‘*Bouverie*’ to bring
“about the forfeiture for which the clause provides? What per-
“centage, short of 100 per cent., of the disuser of the name would
“amount to a disuser of it within the meaning of the clause?
“Those are questions which, in my judgment, are incapable of
“being answered. If they are incapable of being answered, then
“it seems to me that this condition is not so framed as to satisfy

¹⁷ Ante, 400, 404.

“the exacting requirements of the law as laid down in the cases
“to which I have referred.”

I have read that passage in extenso because of the invitation extended to me to inquire whether Vaisey J. had applied the right test; because it seems to me that only if I could be satisfied that he had applied the wrong test could I properly do otherwise than follow his decision. It seems to me to be plain, when the whole passage is read, that although he began by postulating the question asked by Mrs. Marshall and her husband, he was dealing with this clause from the point of view of the court. That, I think, is demonstrated by the sentence at the end of the passage which I read: “Those are questions which, in my judgment, are
“incapable of being answered.”

Taking the view, as I do, with all respect, that Vaisey J. has applied the correct test, the test indicated in *In re Wilson's Will Trusts*,¹⁸ and, bearing in mind that, as I am informed, the old precedents were cited to him, and bearing in mind the earlier passage in his judgment which I have quoted, which makes it perfectly clear that he had taken into consideration fully that these name and arms clauses had been used in accordance with well known precedents for a great number of years, and finally taking into consideration that I can find in its context no difference in effect between the present phrase “discontinue to bear
“and use” from the word “disuse” which Vaisey J. had to consider, I can find no grounds at all upon which it is open to me, sitting as a judge of first instance, to differ from the decision of Vaisey J., and therefore I follow it. In my view, so far as this court is concerned, this question is concluded by the authority of *In re Bouverie*¹⁹; and I propose to declare accordingly that the condition is wholly void and inoperative.

Declaration accordingly.

Solicitors: *Hugh V. Harraway & Son; Slaughter & May;
Druces & Attlee; Savory, Pryor & Blagden.*

F. R. D.

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¹⁸ [1950] W.N. 507; [1950] 2 All E.R. 955, 964. ¹⁹ Ante, 400.

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[1951 H. 4251.]

Power of appointment—Marriage settlement—Appointment by will of settled fund—Object not solely to benefit appointees—Fraud on power.

By his will dated March 29, 1950, a testator purported to exercise a power of appointment conferred on him under a marriage settlement in favour of the children of the marriage, who survived him, in equal shares. The will also contained a proviso that an appointee should not be entitled to a share of the residuary trust fund, unless he assigned the share under the settlement to the trustees of the will to be held on the same trusts as those under which the residuary trust fund was directed to be held under the will:—

Held, that, applying the well established doctrine that an appointment would be held to be fraudulent, if it was executed with a view to furthering some object, which the appointor had in view, and not with the sole object of benefiting the appointee, who was the object of the power, the present appointment was not free from that taint of equitable fraud, which destroyed the efficacy of the exercise of the power; and that the funds were held in trust for the three surviving children and the personal representative of a deceased child in equal fourth shares, not under the appointment, but (in disregard of the appointment) by virtue of the trusts in default of appointment, which were contained in the settlement.

Vatcher v. Paull [1915] A.C. 372, and *In re Crawshaw* [1948] Ch. 123, followed.

King v. King (1864) 15 Ir.Ch.R. 479, and dictum of Farwell J. in *In re Neave* [1938] Ch. 793, 797 considered and not followed.

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By a marriage settlement dated April 9, 1902, it was provided that, after the death of the husband and wife, the settled property should be held in trust for the children or remoter issue of the marriage in such manner as the husband and wife should jointly appoint and, in default of such appointment, as the survivor in like manner or by will and codicil should appoint; and in default of such appointment in trust for “all the children or any the child of the said intended marriage who being male shall attain the age of twenty-one years or being female shall attain that age or marry and if more than one in equal shares.”

The wife died on August 9, 1921. There was issue of the marriage one son and two daughters, each of whom attained the

age of twenty-one years. There was also a daughter, who died intestate on December 23, 1927, having attained the age of twenty-one years and married.

By his will dated March 29, 1950, the husband purported to exercise the power of appointment contained in the settlement. After directing his trustees to hold his residuary trust funds and the income thereof on the trusts therein mentioned for such of his children as should be living at his death and the child or children of any child of his who should die in his lifetime, he proceeded as follows: "In exercise of the power conferred upon me by the settlement . . . I appoint and direct that the trustees of the said settlement shall hold the trust funds comprised therein upon trusts for such of [his three surviving children] as shall be living at my death and if more than one in equal shares. Provided always and I declare that no child of mine who shall survive me shall be entitled to a share of the residuary trust funds or any income thereof unless such child shall as soon as conveniently may be at the expense of my trust estate assign to or otherwise vest in my trustees the share of such child under the said settlement . . . to be held by my trustees upon the same trusts in every respect . . . as the share of such child in the residuary trust funds under this my will and in case any child of mine shall after the expiration of such time as my trustees shall determine refuse or neglect to assign to or otherwise vest in my trustees his or her share under the said settlement then the residuary trust fund shall be held on such trusts as would be applicable under this my will if my child so refusing or neglecting as aforesaid had died in my lifetime a bachelor or a spinster."

It was also declared in the will that the trustees should retain the share of each of the children who should survive the testator in the residuary trust funds on the following trusts, "that is to say upon trust to pay the income thereof to each such child as to my son during his life" [as directed in a subsequent clause] and as to each of my daughters for her life and after the death of each child in trust for the child or children or remoter issue of such child or any of them at such ages or times not being earlier than the age of twenty-one years or day of marriage in such shares (if more than one) and in such manner as such child shall by will or codicil appoint and in default of and subject to such appointment in trust for all the children of my same child who being male attain the age of twenty-one years or being female attain the age or marry in equal shares."

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An accruer clause followed, directing that in case any of the trusts declared concerning any share of the residuary trust funds should fail or determine, there should be a gift over to the other shares in the residuary trust fund. The particular direction with respect to the share of the son was in the nature of a protected life interest with discretionary powers as to the application of the income in the event of his being deprived of the right to receive the income.

The testator died on September 27, 1950, and a summons was taken out by the trustees of his will to have determined (*inter alia*) whether the property subject to the trusts of the settlement was held (a) on trust for the three surviving children in equal third shares by virtue of the appointment contained in the will, or (b) on trust for them and the personal representative of the fourth child in equal quarter shares by virtue of the trusts in default of appointment contained in the settlement, on the footing that that appointment was ineffective.

E. W. Griffith for the plaintiffs.

E. Blanshard Stamp for two of the three surviving children of the testator. The appointment is valid and does not constitute a fraud on the power. The question is whether the appointor had as the purpose of the appointment the benefit of the appointees: see *Farwell on Powers*, 3rd ed., p. 458. The point involved in the present case came indirectly to the notice of *Farwell J.* in *In re Neave*.¹ There was a dictum in his judgment in which he said that in circumstances like these the exercise of the power would have been effective. Consequently the present appointment has been validly exercised.

J. F. Bowyer, J. P. Hunter-Brown and W. A. Bagnall for other defendants adopted the above argument.

J. Turner for the legal personal representative of the fourth child. The exercise of the appointment is invalid. The testator should not be allowed to circumvent the real purpose of the power conferred by the settlement by bringing pressure to bear on the appointees. *In re Crawshaw*² is a clear and binding decision on the court to hold that the exercise of the power in this manner is fraudulent.

[VAISEY J. In that case, in the report of my judgment, at p. 359 (twelve lines from the bottom of the page) the word

¹ [1938] Ch. 793, 797.

² [1947] Ch. 356; [1948] Ch. 123.

"discretion" should be deleted and the word "discrimination" substituted.] VAISEY J.

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This is a plain device to further some irrelevant purpose of the appointor. The point has been taken in the Irish case of *King v. King*,³ a case which appears—not merely by way of dictum—to be in favour of the contention of the surviving children; but it is an old case and no longer applies, as that state of the law has been altered by *Vatcher v. Paull*.⁴

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P. Ingress Bell for the trustees of the settlement.

VAISEY J. stated the facts and the questions raised by the summons and continued:—I think that this is not a very easy question. The authorities, which appear to support the proposition that this kind of scheme by quasi application of the principle of election or otherwise, is operative are to be found in, I think, only two places, namely, *In re Neave*⁵ and the Irish case of *King v. King*.⁶ Farwell J. in *In re Neave*⁵ held that the conditions sought to be imposed by the proviso in that will were ineffective and invalid, and that the appointees took under the appointment free from the conditions which were designed to bring about the settlement of the appointed share. In the course of his judgment the judge said that the testator "has sought to impose as a condition upon the two sons in connexion with their enjoyment of the property, which they take under the power, that they shall settle the appointed property in a way which, if such settlement had been contained in the appointment itself, would have rendered the appointment invalid on the ground that it was in excess of the power. A testator cannot validly impose any such condition as to the enjoyment of the property which he is appointing under a special power and such condition is wholly ineffective." Then the judge proceeds: "But a testator may do this; he may say: 'I exercise the special power of appointment in favour of the objects of the power and I give a portion of my own property, to those objects, but if those objects do not make a settlement of the property which they take under the appointment then they shall forfeit what they would otherwise have taken out of my own property.'" Then the judge continues: "It is said in this case"—that is in the case of *In re Neave*⁵—"that on the true construction of this will that is really what the testator has done." The judge decided, however, that that was not the effect of the will in that

³ (1864) 15 Ir.Ch.R. 479.

⁴ [1915] A.C. 372, 378.

⁵ [1938] Ch. 793, 797.

⁶ 15 Ir.Ch.R. 479.

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case. It seems to me that that dictum—and it is a dictum—of Farwell J. really covers the present case. Further, when I look at the Irish case of *King v. King*,⁶ which is a much older case, there, not merely by way of dictum but as a matter of decision, it was held that, because of the express clause in that will, the legatees could not take the legacies which were given to them by the will without settling their shares in the appointed fund according to the direction of the testatrix. Those two cases, one by decision and the former by dictum, are undoubtedly in favour of the view that the testator's appointment was valid and was not vitiated by any taint of fraud.

On the other side there is a great mass of authority as to what is and what is not a fraud within the meaning of that expression as used in connexion with powers. I have been referred to *In re Marsden's Trusts*⁷ and to *Pryor v. Pryor*,⁸ neither of which cases really comes very near to the present case, because in each of those cases there was something in the nature of an understanding, which raises entirely different questions from that which I have now to decide. There is no question of bargain here so far as I know. The father had not approached the children to induce them to do anything with their shares after his death, but the whole matter turns on what appears in the will itself.

I think that the law on the subject is best to be found in the case of *Vatcher v. Paull*,⁹ where there is a very clear enunciation of the principle by Lord Parker of Waddington in the Privy Council. Then I might also refer, not because of anything which it decides, but because it is a case in which the authorities are summed up, to my own decision in *In re Crawshay*,¹⁰ which was approved in the Court of Appeal. There, again, the authorities were exhaustively considered in the judgment of the court which was delivered by Cohen L.J.

In my opinion this doctrine of fraud on the power has received a good deal of illumination in recent times, and I think that much greater emphasis is laid on that principle today. The doctrine can be summed up in the shortest possible way by saying that an appointment will be held to be fraudulent if it is executed with a view to furthering some object which the appointor had in view and not with the sole object of benefiting the appointee who is the object of the power. In the case of *In re Crawshay*¹⁰ that which the appointor had in view was to

⁶ 15 Ir.Ch.R. 479.⁷ (1859) 4 Drew. 594.⁸ (1864) 2 De G.J. & S. 205.⁹ [1915] A.C. 372, 378.¹⁰ [1947] Ch. 356; [1948] Ch. 123.

bring in some children who had been excluded from the father's will. The appointment was made to a relative who, she had good reason to suppose, would remedy what was regarded as a grave injustice.

In the present case it seems to me that the exercise of the power under this marriage settlement was made for the purpose of furthering an object which the testator had in view and was not confined to benefiting the appointees themselves. I think he was determined that, so far as he could, he would tie up the property with his own property and have it dealt with as if it were his own property.

In my judgment, according to the modern trend of authorities, as exemplified in the case in the Privy Council, and as explained by reference to the earlier authorities in my own judgment and the judgment of the Court of Appeal in *In re Crawshay*,¹⁰ that kind of intention on the part of the appointor vitiates the appointment, because he was doing something to serve his own ends, to carry out his own projects, to give effect to his own ideas of what was right and proper, and not merely, without any regard to those issues, to benefit the appointees themselves. Therefore, I think that this appointment of the marriage settlement fund in the will of the testator was void, and that it was not clear of that taint of equitable fraud which, according to very well-settled principles, destroys the efficacy of the exercise of the power. I hold, though not without some hesitation, that, as the appointment was in my judgment invalid, the trust funds are now held on trust for the three surviving children and the personal representative of the deceased child, in equal fourth shares, not under the appointment, but in disregard of the appointment, by virtue of the trusts in default of appointment which are contained in the settlement.

Solicitors: *Wilson, Wright & Ascrofts, Preston; Warren & Warren; Winder & Holden, Bolton.*

J. L. D.

¹⁰ [1947] Ch. 356; [1948] Ch. 123.

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In re GAPE, DECD. VEREY AND ANOTHER *v.*
GAPE AND OTHERS.

1952
Mar. 13.

affirmed.
[1952] 1 Ch. 743

Will—Condition subsequent—Residuary bequest—"take up permanent residence in England . . ."—Divesting "in default of continuance of compliance with this condition"—Validity.

A testator gave her residuary estate on certain trusts subject to the following condition contained in clause 10 of her will: "Provided . . . that every person who . . . shall become entitled in possession to my residuary estate . . . shall within six months from the date of becoming so entitled take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with this condition the trusts hereinbefore declared in favour of such person and his issue shall determine and become void . . .":—

Held, that the clause embodied a concept of sufficient certainty, and that it was therefore valid.

Sifton v. Sifton [1938] A.C. 656 distinguished; *In re Hatch* [1948] Ch. 592 and *In re Coxen* [1948] Ch. 747 followed.

ACTION.

By her will dated October 27, 1942, Mrs. Sibyl Marion Geraldine Gape, a widow, provided by clause 8 that her residuary estate should be held on trust for James Nugent Gape for life, with remainder for his sons successively, according to their respective seniorities in tail with remainder upon trust for Kenneth Henry Surtees Gape for life, with remainder in trust for his sons successively according to their respective seniorities in tail, with divers remainders over.

By clause 10 she directed: "Provided nevertheless that every person who under the trusts aforesaid (including the divesting limitations in this clause contained) shall become entitled in possession to my residuary estate as tenant for life or in tail male or in tail shall within six months from the date of becoming so entitled take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with this condition the trusts hereinbefore declared in favour of such person and his issue shall determine and become void as if such person were then dead and if tenant in tail male or tenant in tail there was a general failure of his or her issue, and in such

“case the residuary estate shall be held” on certain trusts there set out.

The testatrix died on December 30, 1950.

James Nugent Gape and Kenneth Henry Surtees Gape and their respective families resided permanently in the United States of America.

The trustees of the will took out the present summons for the determination of the question whether the condition contained in clause 10 was valid.

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Peter Foster for the plaintiffs.

Montgomery White Q.C. and *Hunter Brown* for J. N. Gape and his children. This condition is a condition subsequent and is accordingly void unless it is capable of ascertainment ab initio. The phrase “take up permanent residence” is indistinguishable from the condition declared to be void by the Judicial Committee of the Privy Council in *Sifton v. Sifton*¹; see also *Clayton v. Ramsden*.²

Elphinstone for K. H. Gape and his children. This condition comes within the principle of *Sifton v. Sifton*¹ and is accordingly void.

Geoffrey Cross Q.C. and *T. A. C. Burgess* for other remaindermen. This condition is valid. The phrase “take up residence “in England” is equivalent to “take up residence in England “with intention to reside permanently in England.” The true test in determining whether a condition is void or not is whether it embodies a concept capable of ascertainment. In this respect it is of significance to note that the intention of permanently residing in a place is a primary ingredient of the concept of domicile: see *per* Lord Chelmsford in *Bell v. Kennedy*³ and *per* Lord Macmillan in *Ramsay v. Liverpool Royal Infirmary*.⁴ The courts have never held that a person’s domicile was incapable of ascertainment although in any given case it might be very difficult to ascertain.

There is nothing in *Sifton v. Sifton*¹ and *Clayton v. Ramsden*² which precludes the court from giving effect to the condition in issue in the present case. All that *Sifton v. Sifton*¹ decided was that residence in a country *per se* was an uncertain concept; *Clayton v. Ramsden*² decided that marriage to a person of Jewish

¹ [1938] A.C. 656, 675.

² [1943] A.C. 320.

³ (1868) L.R. 1 Sc. & Div. 307, 319.

⁴ [1930] A.C. 588, 597.

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parentage or of the Jewish faith was a concept too uncertain to have legal validity and that is the ambit of these two decisions.

[They also referred to *Udny v. Udny*⁵; *In re Hatch*⁶; *In re Coxen*.⁷]

Elphinstone in reply. Even if this condition embodies a concept which is of a sufficient degree of certainty, that is not enough; for it must be possible ab initio to ascertain the precise moment of time, if the condition be broken, when the gift over takes effect. This condition offends also in that respect.

Montgomery White Q.C. in reply. *Udny v. Udny*,⁵ *Bell v. Kennedy*⁸ and *Ramsay v. Liverpool Royal Infirmary*⁹ are distinguishable; they are cases concerning domicile and have no application to a case concerning the validity or otherwise of a condition subsequent. The present case is indistinguishable from *Sifton v. Sifton*.¹⁰

ROXBURGH J., having stated the facts, continued:—Mr. James Nugent Gape and Mr. Kenneth Henry Surtees Gape and their respective families are anxious to obtain the benefits provided for them by the testatrix without the burden to which she plainly intended to subject them. It is plain that if the testatrix were asked whether Mr. Montgomery White's clients or Mr. Elphinstone's clients should in the circumstances of the case inherit any part of her residuary estate, her answer would be "No." But it is said that the forfeiture clause is a condition subsequent, and that there are decisions of highest authority which, in certain cases, empower beneficiaries subjected to a forfeiture clause to take the benefit of a testator's dispositions without accepting the burdens which he sought to impose. Mr. Montgomery White and Mr. Elphinstone argued that this is such a case, and that it is irrelevant that their clients are in America and flouting the intentions of the testatrix. To that extent they are right. In deciding this question of law it is irrelevant that they are flouting the testatrix's intentions.

The cases upon which Mr. Montgomery White and Mr. Elphinstone rely are, of course, *Clayton v. Ramsden*¹¹ and *Sifton v. Sifton*,¹² a decision of the Privy Council, and in particular the latter which bears a close resemblance to the present case. The principle to be deduced from those two cases I have endeavoured

⁵ (1868) L.R. 1 Sc. & Div. 441.

⁶ [1948] Ch. 592.

⁷ [1948] Ch. 747.

⁸ L.R. 1 Sc. & Div. 307.

⁹ [1930] A.C. 588.

¹⁰ [1938] A.C. 656, 675.

¹¹ [1943] A.C. 320.

¹² [1938] A.C. 656.

to formulate in *In re Hatch*,¹³ and I desire to add nothing to what I there said¹⁴: "The next question which arises is whether the defeasance clause is void for uncertainty. Here I must apply the principles enunciated in *Clavering v. Ellison*¹⁵ and *Clayton v. Ramsden*.¹⁶ In order to do this I must first construe the clause in its context, and then I must see whether any phrase, when so construed, embodies a concept which lacks a sufficient degree of certainty." I discussed the particular phrase in that case, which was different from that used in the present case, and continued: "It is true that cases can be propounded which to one mind may seem to fall within the ambit of the phrase and to another mind may seem to fall outside it. Several such cases have been propounded during the argument, but, on analysis, they all seem to me merely to raise doubts which can be resolved by properly applying the ordinary principles of construction to the phrase employed in the circumstances supposed. I do not think they point to any inherent uncertainty in the phrase itself." The words in that case were wholly different, and I have only cited that passage to indicate my approach to the present problem.

The first thing I have to do is to construe the words "take up permanent residence in England." I do not feel much doubt about their meaning. I understand them to mean "take up residence in England with the intention that such residence should be permanent."

The question which I then have to determine is whether that phrase, when so construed, embodies a concept which lacks a sufficient degree of certainty. First and foremost I must consider *Sifton v. Sifton*.¹⁷ The disposition in the defeasance clause there was "payments to my said daughter shall be made only so long as she shall continue to reside in Canada," and Lord Romer said¹⁸: "If the clause in question be in truth a condition subsequent—a point with which their Lordships will deal later on—it can be of no validity unless, to use the words of Lord Cranworth [in *Clavering v. Ellison*]¹⁹ the court and, their Lordships venture to add, the parties concerned, can see from the beginning precisely and distinctly upon the happening of what events it is that the payments to the appellant are to cease. In their

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¹³ [1948] Ch. 592.

¹⁴ *Ibid.* 598.

¹⁵ (1859) 7 H.L.C. 707.

¹⁶ [1943] A.C. 320.

¹⁷ [1938] A.C. 656.

¹⁸ *Ibid.* 675.

¹⁹ 7 H.L.C. 707, 725.

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"Lordships' opinion it is impossible to define these events precisely or distinctly." Later he said: "None of those learned judges"—that is, the judges in the courts below—"defined or attempted to define precisely or distinctly the events that would constitute a ceasing on the part of the appellant to reside in Canada. Had they attempted to do so they must, in their Lordships' judgment, have failed, because they would have been attempting the impossible. Their Lordships' attention was called during the arguments to numerous authorities in which the court has been called upon to consider the meaning of the words 'reside' and 'residence,' and the like. But these authorities give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least six weeks in a year can present no difficulty. In some contexts the word 'reside' may clearly denote what is sometimes called 'being in residence' at a particular house. In other contexts it may mean merely maintaining a house in a fit state for residence. It is plain, however, that in the present case the word 'reside' means something different from either being in residence or merely maintaining a residence. No one can suppose that the testator intended either that his daughter should never leave Canada, or that so long as she maintained a residence in Canada she might spend the whole of her time abroad. He must have intended that, though Canada was to be her home in general, yet she was to be at liberty to leave Canada for some purposes and for some periods of time. Unfortunately, he omitted to define either the purposes or the periods."

There are undoubtedly passages in that speech which favour Mr. Montgomery White and Mr. Elphinstone, and it is therefore necessary for me to consider carefully how *Sifton v. Sifton*²⁰ has been dealt with in a later case. It was approved in *Clayton v. Ramsden*,²¹ which related to a different set of words, but it has been more closely considered in a more similar case, to which I must shortly return. I propose to discuss first how far the present phrase "take up permanent residence in England" is to be assimilated to, and how far it is to be differentiated from, the phrase in *Sifton v. Sifton*.²⁰ If somebody said to me "I am going to reside in South Africa" I should instinctively ask "How

²⁰ [1938] A.C. 656.

²¹ [1943] A.C. 320.

"long?" because the phrase presents an incomplete mental picture, an incomplete concept. It is quite ambiguous, it might mean for a few weeks; it might mean for ever; it might mean for a particular mission. It is a concept which lacks a sufficient degree of certainty. If a person from South Africa said to me "I am going to continue to reside in South Africa," I think that that phrase, without further explanation, would also embody a concept which lacked a sufficient degree of certainty. If one knew something about the circumstances of that person, that knowledge might supply the answer to the uncertainty involved in the concept. If the circumstances under which he had gone to reside in South Africa were known, then the statement "I am going to continue to reside in South Africa" might well embody a quite clear concept; but in complete ignorance of the circumstances in which a person was residing in South Africa, I do not think that the mere statement "I shall continue to reside in South Africa" would present a mental picture having a sufficient degree of certainty. But if somebody said to me "I am going to take up permanent residence in South Africa," I should have thought that that, as a concept, was plain and precise. Yet, on the other hand, those very questions could be asked of it which Lord Romer asked in *Sifton v. Sifton*.²² Even though a person told me that he intended to take up permanent residence in South Africa, I should not suppose that he never intended to leave South Africa for any period or for any purpose, and yet he had omitted to define either the purposes or the period in respect of which he might be absent from South Africa. Am I bound to say that the phrase embodies a corrupt concept having an insufficient degree of certainty because those questions are unanswered? I must find the answer to my own question by looking further into the authorities.

First of all I will refer to three lines in the speech of Lord Chelmsford in *Bell v. Kennedy*.²³ That was a case of domicile, but it is not for that reason that I am referring to it. Before considering the facts of the case at all, Lord Chelmsford said: "It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile." I am not considering those lines as an exposition of the law of domicile, but "the intention of permanently residing in a place" appears

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²² [1938] A.C. 656.

²³ L.R. 1 Sc. & Div. 307, 519.

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to me to be a phrase embodying a concept. It was used for the purpose of expounding the ingredients of domicile, and it would be strange if Lord Chelmsford, in making such an exposition, made use of a phrase which did not embody a concept having a sufficient degree of certainty, and yet Lord Romer's questions could be put to him too. He might be asked how long could a man leave the place in question and for what purpose, and yet be able to say that he was permanently residing there, and the answer which I suspect that Lord Chelmsford would have given would have been that no certain answer to those questions can be given, but I do not think that he would have admitted that his phrase embodied a concept having an insufficient degree of certainty.

Precisely the same process can be applied to a passage in the speech of Lord Macmillan in *Ramsay v. Liverpool Royal Infirmary*,²⁴ another case of domicile²⁵: "The acquisition of a domicile of choice is a legal inference which is drawn from the concurrence of evidence of the physical fact of residence with evidence of the mental fact of intention that such residence shall be permanent." There again the same questions could be put to Lord Macmillan and he would, I think, have given the same answer; but I do not think that he would have admitted that his phrase embodied an uncertain concept.

I will refer next to the decision of Jenkins J. in *In re Coxen*,²⁶ and to the cases there cited by him. The phrases in that case were that the trustees were to permit the testator's wife to reside in a certain dwelling-house, "during her life or for so long as she should desire to reside therein," and declared "that from and after her death, or if in the opinion of the trustees she shall have ceased permanently to reside therein," the house was to fall into his residuary trusts. Jenkins J. held that the provision for the determination of the wife's interest was sufficiently defined to enable the trustees to come to a proper decision, and yet I should have thought that the same questions which Lord Romer propounded in *Sifton v. Sifton*²⁷ might have been asked in connexion with the phrases there used, and would have been equally difficult to answer.

There are many passages in the judgment in *In re Coxen*²⁸ which throw light on the present case. Jenkins J.²⁸ discussed

²⁴ [1930] A.C. 588.

²⁷ [1938] A.C. 656.

²⁵ *Ibid.* 597.

²⁸ [1948] Ch. 758.

²⁶ [1948] Ch. 747.

the decision of Tomlin J. in *In re Wilkinson*.²⁹ That case was decided before *Sifton v. Sifton* ³⁰ and did not relate to a condition subsequent; too much weight must not therefore be placed on it on this occasion. The testatrix in *In re Wilkinson* ²⁹ had given the income of a fund to a niece "for and during the term of her "natural life or until she shall voluntarily cease to make the "said dwelling-house her permanent home." In his judgment Tomlin J. said ³¹: "I confess I do not feel any difficulty in giving "a rational meaning to the words 'to make the dwelling-house "her permanent home'; I think it is reasonably plain what that "means; it seems to me it means, to keep it up as what may be "colloquially called her headquarters. I do not think there is "any particular difficulty in attaching a reasonable meaning to "the phrase. I do not propose, and I do not think it necessary "for me today to define precisely what I understand the phrase "to mean. I am satisfied that it bears a sufficiently definite "meaning to enable me to say that there is no case of uncertainty "which renders the gift in any way bad, or defective."

Jenkins J. then discussed *In re Talbot-Ponsonby's Estate*,³² where Crossman J. held "with respect to a devise of an estate "to the testator's son 'upon condition that he made the same "'his home' that the condition was not void for uncertainty." He reverted to *Sifton v. Sifton* ³³ and said that he deduced from that ³⁴ "(a) that the meaning (whether definite or uncertain) of "the words 'reside' and 'residence' in a will depends on the "context in which the words are used, (b) that in some contexts "a perfectly definite meaning can be attached to such words, and "(c) that the words 'reside' and 'residence' have different (and "less readily ascertainable) implications when used in relation to "residence in a particular country from those which they have "when used in relation to residence in a particular house." As regards that last deduction, whilst I recognize the passages in Lord Romer's speech in *Sifton v. Sifton* ³³ which led Jenkins J. to that conclusion, I am not quite clear why, as a matter of principle as distinct from context and construction, the word "reside" should have different and less readily ascertainable implications when used in relation to "residence in a particular "country." I should have thought that the implications and

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²⁹ [1926] Ch. 842.

³⁰ [1938] A.C. 656.

³¹ [1926] Ch. 849; cited [1948] Ch.

³² (1937) 54 T.L.R. 33.

³³ [1938] A.C. 656.

³⁴ [1948] Ch. 760.

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differences would arise almost entirely from the context and circumstances in which the words were used.

Jenkins J. proceeded³⁴: "There is, therefore, nothing in "*Sifton v. Sifton*"³⁵ which precludes me from holding the condition here in question to be a valid condition, provided I am able to attach a sufficiently definite meaning to it in the context afforded by the codicil, and (as shown by *In re Wilkinson*"³⁶ and *In re Talbot-Ponsonby's Estate*"³⁷) in deciding whether I am able to do so or not I must keep in mind the distinction between uncertainty as to the events prescribed by the testator as those in which the condition is to operate (which is generally speaking fatal to the validity of such a condition) and difficulty in ascertaining whether those events (sufficiently prescribed by the testator as a matter of definition) have happened or not, "which is not necessarily fatal to such validity." I do not understand Jenkins J. as predicating an approach different from that which I have adopted, though we have expressed ourselves in different language. I think that there is really no difference in meaning between "sufficiently prescribing the events as a "matter of definition" and embodying a concept having "a "sufficient degree of certainty." Jenkins J. held that the phrase with which he was concerned was valid. He said³⁸: "It "seems to me that so far as definition goes the double event "involved in the condition as I have construed it is prescribed "with sufficient certainty and precision." In my judgment those same questions asked by Lord Romer in *Sifton v. Sifton*"³⁹ could have been put to the draughtsman of the will in *In re Coxen*"⁴⁰ and would not have been susceptible of an answer. It seems to me, therefore, for the reasons which I have given, that a phrase may embody a concept of sufficient certainty, or, to put it in another way, "events may be sufficiently prescribed by a testator "as a matter of definition," even though such questions cannot be answered. If that be so, then, in my judgment, the phrase "take up permanent residence in England" embodies a conception which is clear and precise even though it is not possible to answer every question which might be asked with regard to it.

Solicitors: *Field, Roscoe & Co.*

³⁴ [1948] Ch. 760.

³⁵ [1938] A.C. 656.

³⁶ [1926] Ch. 842.

³⁷ 54 T.L.R. 33.

³⁸ [1948] Ch. 761.

³⁹ [1938] A.C. 656.

⁴⁰ [1948] Ch. 747.

In re POZOT'S SETTLEMENT TRUSTS.

C. A.

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[1949 P. 535.]

Evershed M.R.,
Jenkins and
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—

Marriage Settlement—Appointment by will of wife—Appointment of income to three daughters subject to forfeiture—Daughters resident near Nice during war—Construction of forfeiture clause—Effect of Trading with the Enemy Act, 1939 (2 & 3 Geo. 6, c. 89), s. 7—Trading with the Enemy (Custodian) Order, 1939 (S.R. & O. 1939, No. 1198), paras. 1 and 2—Trading with the Enemy (Specified Areas) Order, 1940 (S.R. & O. 1940, No. 1219).

By a settlement dated August 2, 1910, made on the wife's marriage certain of her interests were vested in trustees upon trust to pay the income to the wife for life, and subject thereto the trustees were to stand possessed of the capital and future income in trust for all or such one or more of the children or remoter issue of the intended marriage as the wife should by deed or will appoint. By her will dated February 16, 1937, the wife who had remarried after the death of the first husband recited that there were three daughters of the first marriage and appointed (subject to a provision for the second husband which she had power to make under the settlement) that the trustees were to stand possessed of the trust fund upon trust as to one equal third part to pay the income to one of the daughters (referred to as Georgette) during her life "unless some act or event shall have been done or happened during "my life whereby if the same income belonged absolutely to her "such income or some part thereof would at my death be or become "vested in or charged in favour of some person." (Then there followed an alternative provision as to forfeiture which was immaterial.) Thereafter after the failure or determination during the life of Georgette of the trust or after Georgette's death the trust of the one-third part of the trust fund was directed to be for her child or children as therein mentioned. Identical trusts were declared in favour of the other two daughters and there was an accruer clause in case the trusts of any daughter's share failed.

The wife and the three daughters lived at all material times near Nice and they became enemies under the Trading with the Enemy (Specified Areas) Order, 1940, within the meaning of the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939. The wife died at Nice on June 6, 1941. The question arose whether each of the three daughters did not as from the death of the wife incur a forfeiture of her life interest on the ground that their income became payable to the Custodian of Enemy Property under the Trading with the Enemy Act, 1939, s. 7 (1) (a) and the Trading with the Enemy (Custodian) Order, 1939, para. 1 (i):—

Held, that as the trustees were made liable to pay the income to the custodian and the provision as to vesting in section 7 (1) (b)

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and (c) of the Act and paragraph 2 of the Order only applied to the passing of some proprietary interest, the forfeiture provision had no application.

Decision of Roxburgh J. in *Fraenkel v. Whitty* [1948] Ch. 55 overruled.

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

By a settlement dated August 2, 1910, made in contemplation of the marriage of Francis Louis Frederic Pozot, a Frenchman, and Doris Muriel Twiss (hereafter called the wife), then an infant, there was settled certain reversionary and contingent interests of the wife which, with the sanction of an order of the Chancery Division, were assigned to the trustees of the settlement upon trust to pay the income to the wife for life, without power of anticipation, and after her death to pay one-third of the income to the husband if surviving during his life. Clause 4 of the settlement provided that, subject as aforesaid, the trustees were to stand possessed of the capital and future income of the trust fund in trust for all or such one or more of the children or remoter issue of the intended marriage as the wife should by deed or will appoint; and clause 13 gave the wife power to appoint that a moiety of the capital of the trust fund should be withdrawn wholly or partly for the benefit of any future husband and the issue of such future marriage, the husband not to take more than a life interest.

By a will dated February 16, 1937, the wife who had by a second marriage made after the death of the first husband become Doris Muriel Guerbois, after reciting her power to appoint to issue of the marriage with Francis L. F. Pozot, and that there was issue of the marriage three daughters, Georgette Alphonsine Marguerite Pozot (referred to as Georgette), Janine Xavière Pozot and Simone Louise Pozot, and her power to appoint to an after-taken husband, appointed that the trustees of the settlement should from and after her death pay the income of one equal fourth part of the trust fund to her husband, Fernand Louis Guerbois during his life, and that subject thereto the trustees were to stand possessed of the trust fund upon trust as to one equal third part to pay the income to Georgette during her life "unless
"some act or event shall have been done or happened during my
"life whereby if the same income belonged absolutely to her such
"income or some part thereof would at my death be or become
"vested in or charged in favour of some person or until some act
"or event shall be done or happen within 21 years after my

" death whereby if the said income belonged absolutely to her
 " such income or some part thereof would have become so vested
 " or charged and after the failure or determination during the
 " life of the said Georgette . . . of the trust hereinbefore declared
 " of the said income in her favour the trustees . . . shall during
 " the remainder of her life hold the said income upon the trusts
 " and for the purposes upon or for which would for the time
 " being be held if she were then dead."

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The trust was then set out as from the death of Georgette in trust for her children or child born in her mother's lifetime and attaining the age of 21 years, or in case of daughters marrying under that age, and her children or child born after the mother's death and living at the expiration of 21 years from the mother's death, or in the case of daughters previously married, and if more than one in equal shares. The same trusts were declared in respect of the other two daughters.

In the event of the failure of the trusts declared concerning the one equal third share of any of the three daughters such share was to accrue and be added to the original shares in the trust fund appropriated to the other daughters in equal proportions upon the like trusts. There was no issue of the second marriage.

The Westminster Bank Ltd. was appointed the sole trustee of the settlement on May 24, 1939. At that date all the interests settled by the settlement had either fallen into possession or being contingent interests had failed.

The wife died at Nice on June 6, 1941. In 1943 the daughter Janine Xavière Pozot married her stepfather, the defendant Fernand Louis Guerbois, and there were infant children of the marriage who were the infant defendants.

As from July 10, 1940, the wife and the three daughters became, under the Trading with the Enemy (Specified Areas) Order, 1940, enemies within the meaning of the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, by reason of their residence in or in the neighbourhood of Nice.

In these circumstances the bank took out a summons raising the question (among others) whether each of the three daughters did not, as from the death of the wife, incur a forfeiture of her life interest by reason of the Trading with the Enemy (Custodian) Order, 1939, para. 1,¹ and the Trading with the Enemy (Specified

¹ Trading with the Enemy (Cus- " the existence of a state of war, be
 todian) Order, 1939, para. 1 (i): "payable to or for the benefit of
 "Any money which would, but for "a person who is an enemy, and

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Areas) Order, 1940, on the ground that if the income of her share had belonged absolutely to her such income at the time of the wife's death would have been vested in or charged in favour of some person, namely, the custodian of enemy property.

Vaisey J. said that he felt bound by the decision of Roxburgh J. in *Fraenkel v. Whitty*,² which he could not distinguish and from which he did not wish to dissent. He held, therefore, that there had been a forfeiture of the life interests of the three daughters on the death of their mother.

Two of the three daughters appealed.

Montgomery White Q.C. and *E. G. Wright* for the two daughters. As the three daughters and mother were living in France in the neighbourhood of Nice they became enemies within the Trading with the Enemy Act, 1939, on July 10, 1940, by virtue of the Trading with the Enemy (Specified Areas) Order, 1940. By section 7 (1) (a) of the Act of 1939 the Board of Trade might by order require the payment to the custodian "of money which would, but for the existence of a state of "war, be payable to or for the benefit of a person who is an "enemy." This was in contrast with the power in (b) and (c) to vest property of an enemy in a custodian. Further, by the Trading with the Enemy (Custodian) Order, 1939, para. 1 (i), there is a general direction in exercise of the Board of Trade's power under section 7 that any money which would, but for the state of war, be payable to or for the benefit of an enemy is to be paid to the custodian. Then, in paragraph 2, the Board of Trade is given power to make a vesting order as regards enemy property. All this makes clear the difference between payment of money belonging to an enemy and vesting enemy property. Forfeiture under the provision in the will of the mother is to arise only when "some act or event shall have been done or "happened whereby . . . such income or some part thereof "would . . . be or become vested . . . in favour of some person." That cannot apply to income under the Act or Order of 1939 because the income is not vested in the custodian but was paid to him. The position under the Trading with the Enemy Act, 1914, is dealt with in *In re Münster*,³ and under the Act of 1939

"any money which is to be deemed
"for the purposes of the Act to be
"money which would, but for the
"existence of a state of war, be so

"payable, shall be paid to the
"custodian."

² [1948] Ch. 55.

³ [1920] 1 Ch. 268.

in *In re Gourju's Will Trusts*,⁴ but they do not substantially differ, apart from the fact that under the Act of 1914 a vesting order could only be made by the court. In the present case Vaisey J. felt bound by *Fraenkel v. Whitty*,⁵ but it is contended that that case was wrongly decided. The interest of the three daughters remains vested in them and did not vest in the custodian, who only had the right to be paid the income because it arose in respect of the interest of an enemy. [They referred to *In re Sartoris's Estate*,⁶ *In re Hall*⁷ and section 4 (1) of the Act of 1939.]

Pennycuik Q.C. and *Waite* for the infant defendants. The question is whether there was a forfeiture, and this depends, first, on the construction of the forfeiture clause, and secondly, on how the events which happened applied.

The provision for forfeiture is in two parts, but primarily it was suggested that the first part applied. Taking the gift to Georgette, where the provision is set out in full, the first part of the forfeiture provision is "unless some act or event shall have "been done or happened during my (the testatrix's) life whereby "if the same income belonged absolutely to her such income or "some part thereof would at my death be or become vested in "or charged in favour of some person." It is plain that this is dealing with income and not corpus, and with the income after the death of the mother. That the income should have belonged to someone else involves that person receiving the income during the rest of the life of Georgette. An example would be if Georgette assigned the income to arise after the death of her mother during the residue of her life. That would have been an act by which the right to receive it had vested in the assignee. "Vest" can only mean "belong in equity." That, however, is effected in the words of the forfeiture provision "or some part "thereof," so that something less than an assignment for life would suffice. That is material in considering the position of the custodian, who became entitled to the income only until Georgette ceased to be an enemy. There would still, however, be a vesting, by which is meant a vesting in equity or "belonging in equity." When the will talks of income becoming vested in some other person it means that by one road or another Georgette's income, or some part, gets into the hands of another person, and that is exactly what happens under the Trading with the Enemy Act,

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⁴ [1943] Ch. 24.⁵ [1948] Ch. 55.⁶ [1892] 1 Ch. 11.⁷ [1944] Ch. 46.

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1939, s. 7, and the Trading with the Enemy (Custodian) Order, 1939, para. 1 (i). "Vest" is defined in the Oxford English Dictionary as "give the property." The particular interests of the custodian are defined, for the purpose of the last world war, in *In re Gourju's Will Trusts*,⁸ and during the first world war in *In re Münster*⁹ under the Trading with the Enemy Act, 1914. This provided that income had to go to the custodian in suspension until it was decided by Parliament how it was to be applied. The income was then vested in the custodian, though only as to some part of it, so as to make the forfeiture provision apply: see, in this connexion, paragraph 3 (1) of the Order of 1939, by which the custodian was to hold any money paid to him until the end of the war, when it would be dealt with by the Board of Trade.

Montgomery White Q.C. in reply.

EVERSHED M.R. The first point raised in this case is in form an appeal from Vaisey J., but in substance an appeal from Roxburgh J. in *Fraenkel v. Whitty*.¹⁰ The question is not an easy one, and we have to consider whether we should take time to consider our decision. But since the argument concluded yesterday we have had time to consider the question together, and though we have arrived at a different view from that of Roxburgh J. we have not thought that there would be any advantage gained in postponing our judgments.

The question is whether the effect of the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, of September 16 of that year, as amended, operated, in the circumstances of the present case, to cause a forfeiture of the life interests appointed by the will of Madame Doris Muriel Guerbois (to whom I will refer hereafter as "Doris"), pursuant to the terms of the settlement made upon her first marriage with M. Pozot. If this question is answered affirmatively (as Vaisey J. answered it, following the decision of Roxburgh J.¹⁰), a further question arises on the construction of the will of Doris, by which the appointment was made, as to the present effect of that forfeiture.

[His Lordship stated the facts and continued:] As a result of the order made by Vaisey J. the present position is in fact that the income of the entire trust fund is now payable to or for the benefit of the five infant children of the second defendant (the respondents to the appeal), and no part of such income is payable

⁸ [1943] Ch. 24, 29.

¹⁰ [1948] Ch. 55.

⁹ [1920] 1 Ch. 268, 277.

to either the third or fourth defendants, who are the appellants in this court; but the interest of the five infant defendants is liable to be reduced upon the birth of further children to the second defendant and also upon the coming into existence of children of the third or fourth defendants respectively.

I have stated that Doris and her three children were at all material times resident in what was known as unoccupied France during the late war, and they all of them accordingly became "enemies" within the meaning of the Trading with the Enemy legislation at all material times, including the time of the death of Doris on June 6, 1941. The first question is whether the effect of the Trading with the Enemy Act, 1939, and the orders made thereunder, was, upon the death of Doris, to cause an immediate forfeiture of the limited interest given to each of her daughters by the appointment made by Doris in her will, on the ground that in each case the income appointed (if belonging absolutely to such daughter) would have become "vested in, or charged in favour of some person." It is clear that the words "some person" must mean some person other than the named daughter, and that the Custodian of Enemy Property appointed pursuant to the Trading with the Enemy legislation was and is such a person. It is clear, also, that nothing turns on the alternative words "or charged in favour of." The matter, as the arguments have proceeded, turns on the proper interpretation of the earlier words "vested in."

One other matter I can dispose of briefly and at once. The relevant appointment consists, as will be remembered, of two parts. The first one-third of income given to Georgette is given to her "unless some act or event shall have . . . happened during my life whereby," etc., or, alternatively, is given to her "until some act or event shall be done or happen within 21 years after my death whereby," etc. Mr. Pennycuick has said that if the facts are such as do not bring the case within the first limb of the provision to which I have alluded then at any rate a forfeiture is brought about by the second. I cannot agree that the second part has any application in any circumstances in the present case. It seems to me tolerably clear that the Trading with the Enemy (Specified Areas) Order, 1940, which made the Act apply as regards unoccupied France, was an "act or event" which happened during the life of Doris such as would, at Doris's death, cause the rest of this part of the clause to operate, if the word "vested" is satisfied by the effect of the Trading with the Enemy legislation in other respects. If, however, this part of

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the clause did not take effect because there would have been no "vesting" within the meaning of the will, then in my opinion there is no doubt but that the second alternative part of the clause is also ineffective. In my judgment, nothing that happened after Doris's death can in any circumstances be regarded as an "act" or event within the meaning of the words used.

The whole question, then, turns on the significance of the two words "vested in." In approaching this problem I agree with Mr. Pennycuik that it is not legitimate to give words in this will a strained construction in order to avoid a particular result on the ground that the particular problem which has arisen was not envisaged by Doris at the time when she made her will. On the other hand, it is no less legitimate to bear in mind that forfeiture clauses are given a strict construction by this court. In the recent case of *In re Westby's Settlement*¹¹ I referred, in delivering the leading judgment, to the proposition which I have mentioned, and used this language, which I hope I shall be forgiven for quoting, in reference to a decision of Farwell J. in *In re Greenwood*¹²: "First of all, we must bear in mind that the courts 'do not construe gifts on forfeitures so as to extend their limits beyond the fair meaning of the words unless they are actually driven to it. Forfeitures are not regarded with favour, and there can be no particular desire to extend the terms of a forfeiture clause to a gift such as the present.'" I think, therefore, as a premise to what follows, that it is necessary to give to this clause not an unnatural or strained construction but a strict one, bearing in mind that the language used is the technical language of lawyers or equity draftsmen who are employed in drawing wills or appointments of this character. And certainly the word "vested" to such persons may be regarded as a term of art, and it has, as such, in my judgment, undoubtedly the significance of a passing of some proprietary interest.

I referred during the argument, and I refer again, to the definition in Stroud's Judicial Dictionary and to the passage cited from *Coverdale v. Charlton*.¹³ The relevant passage is: "To 'vest generally means, to give the property in.'" (*Coverdale v. Charlton*.¹³) "It may be useful to refer to the history of the 'word 'vest,' as it is a word which has acquired a definite meaning, carrying with it definite legal consequences." Then there are references to its use in the Lands Clauses Consolidation Act, 1845, the Trustee Act, 1850, and the Bankruptcy Act, 1869.

¹¹ [1950] Ch. 296, 304.

¹³ (1878) 48 L.J.Q.B. 128, 132.

¹² [1901] 1 Ch. 887.

In *Fraenkel v. Whitty*,¹⁴ which is, substantially, the case now under appeal, Roxburgh J., who had to construe a deed of covenant which contained language directed to a forfeiture substantially identical with the words which are contained in Doris's will, came to the conclusion that he did (as I follow him) because he thought that the effect of the Trading with the Enemy legislation was to produce a result, if not in strict parlance a vesting as understood by lawyers, at least having a practical result equivalent to a vesting. In my judgment that was not a legitimate way to construe such a clause as this. The words in this particular will are "or become vested in"—not "or so held as "to be in effect vested in," or any other words of similar wide and general import.

I must now, however, turn to the Trading with the Enemy Act and the orders made thereunder, so that I can make clear the reasons for my conclusion. The Act of 1939, by section 7 (1), provided as follows: "With a view to preventing the payment "of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of "peace, the Board of Trade may appoint custodians of enemy "property for England, Scotland and Northern Ireland respectively, and may by order (a) require the payment to the prescribed custodian of money which would, but for the existence "of a state of war, be payable to or for the benefit of a person "who is an enemy." Then paragraphs (b) and (c) give power to the Board of Trade to vest property in the custodian. Paragraph (d) is, "confer and impose on the custodians and on any "other person such rights, powers, duties and liabilities as may "be prescribed as respects—(i) property which has been, or is "required to be, vested in a custodian by or under the order; "(ii) property of which the right of transfer has been or is "required to be, so vested; (iii) any other enemy property which "has not been, and is not required to be, so vested; or (iv) money "which has been, or is by the order required to be, paid to a "custodian"; and (e) covers the requirement of payment of fees. In subsection (4) it is provided that "any order under "this section shall have effect notwithstanding anything in any "Act passed before this Act." I need not refer to any other part of the Act, save to make a brief reference to section 4, because Mr. Montgomery White attached some importance to it. Section 4 relates to negotiable instruments and choses in action

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belonging to enemies, and subsection (1) provides (briefly) that "no assignment of a chose in action made by or on behalf of an enemy shall, except with the sanction of the Treasury, be effective so as to confer on any person any rights or remedies in respect of the chose in action."

Now from what I have read, this much, I venture to think, is clear, that there is in this Act, and in the passages of it which I have read, the clearest distinction between vesting on the one hand and payment of money on the other; and it is to be noted that this Act differs in this respect from the Trading with the Enemy Act passed on the occasion of the first world war—Trading with the Enemy Act, 1914. Under the latter Act, vesting orders were made, and had to be made, by the court. Under this Act it is provided that the Board of Trade may, indifferently, make vesting orders and orders requiring payment. But for present purposes the essential matter is the clear distinction which I think is to be found in the language of Parliament between vesting, on the one hand, and payment on the other. By "vesting," in such a context, I have no doubt that Parliament was signifying an operation which would pass to the custodian a proprietary interest in the subject-matter vested; and the significance of section 4, of which I do not desire to make too much, is that it seems to indicate that notwithstanding that there may have been orders for payment, under the sanction of the Treasury the assignment of a chose in action is contemplated; and there could, of course, be no assignment of anything unless the assignor had something to assign. It is, perhaps, merely an emphasis on the distinction I made clear in the Act between vesting and payment.

I now come to the Order which I have already mentioned, the Trading with the Enemy (Custodian) Order of 1939. The relevant parts of the Order appear in the footnotes to *Fraenkel v. Whitty*,¹⁵ but I think it would not be right for me to pass over this Order merely by such reference. Paragraph 1 (i) is a general direction in exercise of the Board of Trade's power under section 7—"Any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, and any money which is to be deemed for the purposes of the Act to be money which would, but for the existence of a state of war, be so payable, shall be paid to the custodian." Then sub-paragraph (ii) descends to the particular and expands

¹⁵ [1948] Ch. 55.

what sub-paragraph (i) has provided. "Without prejudice to the generality of the foregoing paragraph, there shall be paid to the custodian in particular any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, by way of": and then a number of specified heads of description of money which would come to the hands of the payer and would have to be paid over to the custodian are set out, including, as the last item, "(i) payment arising under any trust, will or settlement"; and assuming other things in favour of Mr. Pennycuik there is no doubt that that provision would cover, on the face of it, money arising under the settlement contained in the deed of 1910 and the appointment of 1937. Then there is the provision in sub-paragraph (iv) which has a significance in the argument, and it is this: "Any money required to be paid under the foregoing paragraphs of this article to the custodian, shall be paid," and then I will take (c), the last heading, "in any other case, within 14 days after the day on which the money becomes payable or would, but for the existence of a state of war, become payable." Pausing there, the effect is (as I follow it) that where, under the terms of a trust, the trustees have in hand at any particular point of time money which, by the terms of the trust, becomes then payable by the trustees to the beneficiary, if that beneficiary is an enemy, the money has to be paid to the custodian, not immediately but within 14 days after the date which I have mentioned. I shall return to state the significance of that matter hereafter. Then in paragraph 2 of the Order the Board of Trade is given power, in any case where it appears to them to be expedient so to do, to make a vesting order as regards the enemy property therein mentioned. I need not for the present refer to any more of the original Order except paragraph 7, which provides that: "There shall be retained by the custodian fees equal to two per centum of (a) the amount of moneys paid to him, and (b) the value" (the words "at the date of vesting" originally in the Order have since been excluded) "of any property which is vested in him or of which the right of transfer is vested in him."

The clearest distinction is drawn throughout that Order between vesting on the one hand and payment on the other. The Order is made, as its introductory paragraph states, under section 7 of the Act; and following the dichotomy between vesting and payment it may, I think, be safely asserted that the provisions of paragraph 1 (ii), which particularly relates to the question of money,

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are made under the terms of section 7 (1) (a) as being orders requiring payment, whereas the powers contemplated by paragraph 2 of the Order, if exercised, would be made under section 7 (1) (b) or (c). Furthermore, I think that if and so far as the Order requires third parties (in this case, say, Westminster Bank Ltd.) to pay over money to the custodian, that obligation is imposed on Westminster Bank Ltd. by section 7 (1) (d) (iii). And the distinction is, I think, further emphasized by another important addition to the original Order, namely, that now contained in paragraph 1 (vii) as a result of the addition made by the amending Order, the Trading with the Enemy (Custodian) (Amendment) Order, 1941 (S.R. & O., 1941, No. 765), which adds, among other things: “(vii) The custodian shall have power to sue “for and recover any moneys payable to him under this Order.” That is added to the first paragraph and relates, therefore, to moneys which the Order states are payable to the custodian; and it was thought proper—indeed necessary—to confer specially upon the custodian a statutory power to sue for and recover such money. If and so far as there had been a vesting in the custodian of the subject-matter out of which the payments arose, no special statutory power to sue would, I conceive, have been necessary.

I hope that, having regard to the importance of the matter, I shall not be thought to be spending too much time on this problem; but in the course of the discussion before Roxburgh J. much of the argument was directed, first, to the proper effect of the interpretation to be given to the formula “money which “would . . . be payable to . . . a person who is an enemy,” and, secondly, to the precise effect of this 14 days’ interval which is given between the day when the trustees have, under the terms of their trust, money in hand and payable to a beneficiary, and the time when they become liable to be sued by the custodian. As regards the first matter, I have no doubt, for myself (and I do not think counsel disagreed about it) that the use of the present tense in the phrase “a person who is an enemy” in paragraph 1 (i) and paragraph 1 (ii), is a reference to the point of time when, to take the case of a trust, the money has become, in the hands of the trustees, payable to that (enemy) beneficiary. It appears then in the case of money, with which we are concerned here, that the phrase has the result that when any money which, under the terms of the settlement and the appointment, would be payable to a person who was, at the date when, under the terms of the trust, it became so payable, an enemy, then a period of 14 days is, nevertheless, allowed under this Order (for obvious

administrative reasons) which the payer, the trustee, has before he becomes under the final obligation liable to be sued for payment over to the custodian.

A question raised was what would happen if, after the date when, under the terms of a trust, a particular sum of money representing income became payable to the beneficiary, who was then an enemy, but before the expiration of the 14 days or before the time when the money had been handed over, the beneficiary, who was not an enemy national, escaped from the enemy country and arrived in England, and thereupon claimed payment? It seems to me that the answer to that problem, under the terms of this Order, is (and what I am now stating agrees with the conclusion of Roxburgh J.) that when once the money has become payable to a person who is at that point of time an enemy, then it is payable to the custodian, and the return to these shores of the beneficiary before actual payment would not have the effect of depriving the custodian of his right to recover that particular item of money. That is reinforced by the circumstance that under the terms of paragraph 3 (iv) of this Order, as amended, it is also provided that the custodian is entitled to give a good discharge for any sums paid to him pursuant to the Order. On the other hand, if the operation were one of vesting during such period as the beneficiary was an enemy, then so far as I can see his arrival in this country, before actual payment, thereby embarrassing himself from his enemy quality, would cause an immediate revesting and would put an end to the right of the custodian. However, it is perhaps at this stage significant to note that according to the evidence a material fact in this case is that none of the money in question has been handed over to the custodian. Westminster Bank Ltd. now has sums of money in its possession which it has never been called on to pay over to the custodian. It seems to me that it would be very difficult to say that any such sums of money were "vested" in law in the custodian. The custodian may or may not have the right to call upon the bank to pay over some or all of the money. If he has, it is, to my mind, a right dependent on a particular statutory right given to him and not on a proprietary title. I should add that in point of fact no fees have been charged in respect of this income by the custodian, so that no question arises of the effect (whatever it might be) of the liability of the income for the provision of such fees.

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We have been referred to the cases of *In re Munster*,¹⁶ decided in 1920, and *In re Gourju's Will Trusts*,¹⁷ decided in 1943. These cases came before Russell J. and Simonds J. respectively, the first arising under the Trading with the Enemy Act, 1914, and the second under the existing Act. The effect of those cases undoubtedly is that money actually in the hands of the custodian is treated as held upon "statutory suspense": no beneficial interest in it can be asserted by anybody. Certainly, the custodian cannot be regarded as holding such money as trustee or agent for the original enemy beneficiary. In that respect there is no distinction between the two Acts. It is, no doubt, true also that any money which has in fact been paid to the custodian and is in his hands may properly be said, according to the ordinary use of language, to be then "vested" in the custodian—and not vested in him on behalf, as I have said, of the original beneficiary. But the ability so to assert does not, I think, advance the respondents' case.

In considering the construction of Doris's will the essential formula "income or some part thereof would . . . be or become "vested in" must relate in the context to the life interests given and, therefore, mean that "the right to receive the income would "be or become vested" at the death of Doris. At the moment of Doris's death the income in question was not an existing entity, in the same sense as a fund of a corpus to which the formula also applies. It is, therefore, this life interest, this right to receive the income of which, if Mr. Pennycuick is right, it must be shown that it vested or would, apart from the forfeiture provision, have been vested in the custodian as a result of the Trading with the Enemy legislation to which I have made reference. By the effect of that legislation the custodian, as I have said, had the right to demand payment to him of that income as it fell due; but he surely had that right, not because some proprietary interest under the settlement from which the income sprang was vested in him: on the contrary, he had the right to demand payment for the very reason that the proprietary interest, the life estate, was not vested in him but was vested in an enemy under the legislation, namely, Georgette. I think, therefore, that there was no such proprietary interest under the trust fund or its income which, by the terms of this legislation, vested in the custodian. Mr. Pennycuick put it thus: that where a third party (in this case the custodian) has a right to receive some part of the income as it accrues under a

¹⁶ [1920] 1 Ch. 268.¹⁷ [1943] Ch. 24.

settlement and to receive and hold it, not merely as a trustee or agent for the beneficiary under the settlement, then there is a vesting. But that, I think, with all respect to Mr. Pennycuick, is an oversimplification of the argument, and disregards the fundamental distinction that the custodian's right to receive the income depends essentially on the circumstance that a proprietary interest in the investments is not vested in him but in "an enemy" within the meaning of the legislation. The difference and distinction, I doubt not, is a somewhat narrow one, but I think or hope, at any rate, that it is clear and sensible to a lawyer.

I have drawn attention, by way of illustrating the distinction, to the point arising from what I call the 14 days' interval in paragraph 1 (iv) (c) of the main Order; and I have also drawn attention to the addition to the Order of the right to the custodian to sue, given in the case where the Order requires payment to him of particular money, and not, of course, directed to the case where the proprietary interest from which the money springs is vested in the custodian. In the course of our discussions my brother Jenkins further illustrated the distinction thus. Suppose, in reference to one of the investments held by the trustees of the settlement, there was a bonus issue of shares distributable, according to the terms of the settlement, to the tenant for life. It is, I suggest, quite manifest that, under the terms of this Order as it stands, the custodian would have no claim whatever to those shares, for they are not "money" and they are not covered by the direction for payment. If, on the other hand, there had been a vesting in the custodian of the proprietary interest from which such a bonus issue sprang, then, of course, the custodian would be entitled to the shares as the fruit of the subject-matter vested in him. And recent legislation has after all made us familiar with the distinction, which might have been obscure to our ancestors, between the position of those who are given statutory rights, having no proprietary interest, and those who have proprietary interests conferring privileges which are not for practical purposes different from the statutory rights. I quoted during the course of the argument the instance of the Minister who requisitions property. He has, in respect of the property so requisitioned, for all practical purposes, all the advantages and privileges of a tenant—the right to possess and the right to exclude others from possession; but he has no estate or interest in the property whatever and cannot, therefore, confer any estate or interest upon any other person. And the same may be said to be the situation of

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the phenomenon of the age commonly known as the statutory tenant.

I turn finally to the judgment of Roxburgh J. in *Fraenkel v. Whitty*,¹⁸ on which I would like to make some observations. *Fraenkel v. Whitty*¹⁸ was a case in which the forfeiture clause arose under a deed of covenant, but the actual language was not in any material respect dissimilar from the present. In particular, though it comprehended the two alternatives "vested in or "charged in favour of," it did not, as the present case does not, include the other words, so frequently seen in covenants of this kind, "or payable to"; but, as I have already said, the judge came to the conclusion that a forfeiture was incurred because, under the terms of the Order that I have read, if the particular annual sums had belonged absolutely to the recipient, they would have vested in the custodian in the sense that they would have been held so as to be payable to him as though they were vested. I do not think that in so stating I am doing injustice to the judgment. "Accordingly," said the judge, "the event which "happened would have caused the June instalment to be payable "to the custodian within 14 days of its due date, and under "penalty if not paid. It would have vested in him the right to "sue for it and to give a good discharge for it. It would have "put him in a position as strong as, or indeed stronger than, that "of a legal assignee. It is difficult to see what more could have "been done to 'vest' that instalment in him, short of actual "payment, and the context shows that in the deed 'vest' cannot "refer to actual payment. No vesting order under the Act could "have given the custodian more. In my judgment the word "'vest' in this deed is used to indicate just such a situation as "the Act would have brought into being in relation to the June "instalment, and there would have been a vesting of it in the "custodian." With all respect to the judge, I am unable to accept that reasoning. I do not think it true that the event which happened would have vested in the custodian, within the meaning of the deed in question, the right to sue for it. It would have had that effect only in the sense that under the terms of the Order the custodian had a statutory right to sue if not paid; but I do not think that there is such a vesting as is comprehended by the proper use of that word; and although I do not at all dissent from the view that for practical purposes the custodian may have been in as good a position as if there had been a vesting, that

¹⁸ [1948] Ch. 55, 59.

does not seem to me to involve the conclusion that there was a vesting.

The judge then proceeds to say: "In reaching this conclusion, 'I have assumed that the phrase 'would be payable,' when used 'in paragraph 1 (i) of the Order, means 'would be payable at the 'date of the Order or would thereafter become payable,' and 'that once money has become payable, its character is fixed, and 'it must be paid to the custodian, whatever may be the subsequent history of the person to whom it became payable.'" There is then a long paragraph in which he proceeds to deal with what he states to have been the argument of Mr. Danckwerts for the view now put forward by Mr. Montgomery White. I confess that I have felt considerable difficulty in comprehending this paragraph. To Mr. Danckwerts is attributed an argument, as a premise to his whole case, which required the construction of the simpler words "would be payable" in section 7 (1) (a) of the Act as meaning "would be payable at the date of the Order or 'would thereafter become payable and would continue to be 'payable,'" so as to produce the result (contrary to what I think is the true result) that if, before actual payment under the terms of paragraph 1 of the Order of 1939, an enemy beneficiary returned to this country disembarassed of his or her enemy character, the right of the custodian to require payment would come to an end. I do not think that is a right conclusion; and if and so far as Mr. Danckwerts made it the basis of the argument against that which commended itself to Roxburgh J., I agree with Roxburgh J. in his rejection of it. I cannot, indeed, avoid altogether the suspicion that if such was the argument put forward the judge may well have been influenced strongly towards the conclusion that he reached by the fallacy in the argument that he described as the alternative. My difficulties are increased by the circumstance that the law reporters, in stating what Mr. Danckwerts' argument, in fact, was, do not attribute to him the unfortunate and (as I think) erroneous premise which, it seems, Roxburgh J. thought had been the foundation of his case.

Whatever may be the solution of the particular problem, however, I have, for the reasons which I have attempted to state, felt compelled to differ in this matter from Roxburgh J., and I am bound to say that I think his conclusion in *Fraenkel v. Whitty*¹⁹ was incorrect. The result in the present case is that the foundation of Vaisey J.'s conclusion is gone and I think that the appeal

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on this first question should succeed. The result is that the other question raised in the appeal no longer arises. We have considered whether, in the circumstances, we ought to express our view upon it, but as it appears to turn almost entirely on the construction of this particular document it does not seem to us necessary to pursue that matter and, therefore, I do not propose to say anything about it. In my judgment, on the first point the appeal succeeds and the order made below should be reversed accordingly.

JENKINS L.J. I agree, but as we are differing from Roxburgh J. and Vaisey J., who followed Roxburgh J., on a point of some difficulty and importance, I may perhaps be excused for adding a few observations of my own. The question in the case is whether the complex of events comprising the outbreak of war between this country and Germany, namely, the passing of the Trading with the Enemy Act, 1939, the making of the Trading with the Enemy (Custodian) Order of the same year, the invasion of France by the German forces and the consequent making of the Trading with the Enemy (Specified Areas) Order, 1940, on July 10, 1940, and the making of the Trading with the Enemy (Custodian) (Amendment) Order, 1941, on May 30, 1941 (all events which happened in the lifetime of the wife settlor), operate when coupled with the residence of the three income beneficiaries in France to cause a forfeiture of their life interests. This depends on whether they amounted, within the meaning of the appointment, to an act or event done or happening during the life of the settlor whereby, if the income had belonged absolutely to the income beneficiaries, such income would, at the settlor's death, be or become vested in or charged in favour of some (*scilicet* other) person. That, I think, is the question, for I agree with my Lord that if the events here under consideration cannot be shown to have brought about a determination of the life interest under the first branch of the provision for forfeiture contained in the appointment, it is reasonably plain that no forfeiture can have been brought about by any act or event done or happening within the scope of the second branch.

That is the question, and it raises, in effect, two points: First, what is the true construction of the provision for determination contained in the appointment, and, secondly, what was the effect of the Trading with the Enemy Act, 1939, and of the Orders made thereunder upon the property in this country of technical enemies, as, for example, the income beneficiaries under this settlement,

such as to bring about a forfeiture, having regard to the true construction of the forfeiture provision?

I propose to address myself first to the question of construction. The material words are "unless some act or event shall have been done or happened during my life"—that is, the life of the settlor—"whereby if the same income belonged absolutely to her"—that is, to the income beneficiary—"such income or some part thereof would at my death be or become vested in or charged in favour of some" (scilicet other) "person." Clauses of this general description have a fairly long history, and any conveyancer will have seen them in many settlements in a large variety of forms. What may perhaps be termed the rudimentary form is a gift to the income beneficiary "until he shall assign or charge or attempt to assign or charge the income or any part thereof." A clause in that form, from the point of view of complete protection, is obviously imperfect, for it would not apply to events in which the income beneficiary played a purely passive role (as, for instance, the event of bankruptcy), and an improvement or enlargement of the clause, as regards the circumstances bringing about the events sought to be guarded against, is sometimes met with in the form of a trust to pay the income to the beneficiary "until any act or event shall be done or suffered by" the beneficiary whereby the result to be prevented would be brought about. That includes the case where the beneficiary plays a passive role.

A yet wider form may be framed (as in this case) so as to depend merely on the doing or happening of some act or event without any qualifying words to indicate who the actor is to be or to suggest permission on the part of the beneficiary. That considerably enlarges the scope of the clause. As to the events which are to occasion forfeiture, as distinct from the circumstances bringing them about, the clause may be framed so as to create a gift over, as already instanced, in the case of an assigning or charging, or attempted assigning or charging. That may not cover all events. I mentioned the possible circumstance of bankruptcy, where, although there is a vesting in the trustee, there may have been nothing amounting to an assignment in his favour. Such events as that are covered, or may be covered, by the use of the word "vested," sometimes in addition to, and sometimes in substitution for, the reference to an assignment or charge. For instance, a common variant is the form used here—"until some act or event shall be done or happen whereby the income, if belonging absolutely to the beneficiary, would be or become

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“vested in or charged in favour of some other person.” Lest that should not suffice to cover all events, recourse is sometimes had to a wider form of words, “be or become vested in or charged in favour of or payable to some other person.” Lastly, I would refer to perhaps the widest form of all, the compendious form used in section 33 of the Trustee Act, 1925, where the interest of the principal beneficiary is made to endure until any event happens whereby, if the income belonged absolutely to him, he would be deprived of the right to receive the same or any part thereof.

Each of these forms has its own scope; and when the question arises whether a forfeiture has occurred under a particular settlement it is necessary to look critically at the language of the particular clause and see whether, having regard to the language of that clause and the nature of the event relied on as bringing about a forfeiture, a forfeiture has been incurred. The words here, as I have said, are “be or become vested or charged in favour of some” (scilicet other) “person.” It has not been contended before us, nor do I think it could be contended with any reasonable prospect of success, that there has been any charge in this case. The argument is centred on the question whether there has been a vesting of the income or some part thereof in some other person. “Vesting” is, I think, a term of art; and to my mind, and, I should say, to the minds of most lawyers, it would connote a vesting in point of interest—a transfer of the property, or the passing of a proprietary interest of some sort, to the person in whose favour the vesting is said to take effect. Thus, in my view, the event here contemplated by the words “become vested in some person” is an event amounting to a transfer of the ownership of, or of a proprietary interest in, the income or in some part thereof to some other person. It follows, in my judgment, that no forfeiture was here incurred unless the Trading with the Enemy Act, 1939, and the Orders made thereunder fairly considered, and with their legal consequences properly taken into account, would, apart from the forfeiture provision, have brought about something amounting to a vesting in the custodian of the income or some part thereof, in the sense of a transfer to the custodian of a proprietary interest therein.

Mr. Pennycuick’s forceful and persuasive argument took this form. He said the income beneficiary was entitled to the income of a share of the fund during her life. What did that mean? It meant simply that she had the right to receive the income of the share during her life. The effect of the Trading with the Enemy

Act, 1939, and Orders, apart from the forfeiture provision, would have been to give the custodian the right to receive that income as and when it accrued, so long as the beneficiary continued to be a technical enemy. Therefore, said Mr. Pennycuick, the right to receive the income during that period would have become vested in the custodian, and therefore the income would have become vested in the custodian within the meaning of the forfeiture provision in the appointment. With all respect to Mr. Pennycuick, that is to my mind an oversimplification. Each of these income beneficiaries had a life interest in a share of the fund. That means, no doubt, a right to the income of that share of the fund during her life. That is an interest well known in equity, and I would describe each of them as the beneficial owner for life of one-third of the fund, and, consequently, a beneficial owner for life of the income accruing and to accrue from the fund. That is the nature of their interest. No doubt, as an owner of such equitable interest, each of the income beneficiaries had the right to receive her share of income, and no doubt the right to receive the share of income is the most important incident of ownership; but while the owner of an interest in income has a right to receive the income it does not follow that anyone else who, by whatever means and for whatever purpose, is given a right to receive that same income, becomes the owner. The person who is given the right to receive the income may or may not become the owner; but it does not follow that he is the owner because he has the right to receive the income.

My view being, therefore, that "vested in some person" means vested in point of proprietary interest in some person, it remains to consider the provisions of the Trading with the Enemy Act, 1939, and Orders to see whether (apart from the forfeiture clause) the operation of those provisions was such as to give the custodian in this case a proprietary interest in the income of these three beneficiaries under the settlement or in some part thereof. I will not traverse again at length ground already covered by my Lord. The Trading with the Enemy Act of 1939 provides, in section 4 (1): "No assignment of a chose in action made by or on behalf of an enemy shall, except with the sanction of the Treasury, be effective so as to confer on any person any rights or remedies in respect of the chose in action; and neither a transfer of a negotiable instrument by or on behalf of an enemy, nor any subsequent transfer thereof, shall, except with the sanction of the Treasury, be effective so as to

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“ confer any rights or remedies against any party to the instru-
“ ment.” I cite that provision as a provision to be borne in mind
in considering the Trading with the Enemy Orders as showing
that, so far as the Act is concerned, it does appear to recognize
something in the nature of a proprietary interest remaining in an
enemy and capable of being assigned by an enemy, for it is only
on that footing that it was necessary to enact by section 4 (1)
that an assignment should not be valid except with the sanction
of the Treasury.

The only other section of the Act to which I need refer is
section 7, and my Lord has already made reference to it. Its
provisions are enabling in character, and the relevant operative
provisions, in substance, are to be found in the orders made
under those enabling provisions. Turning to the main Trading
with the Enemy Order—the Trading with the Enemy (Custodian)
Order, 1939—one finds there, as in the Act itself, a clear dis-
tinction between two possible courses. The orders contemplated
by section 7 may, on the one hand, require the payment to the
prescribed custodian of money which would, but for the existence
of the state of war, be payable to or for the benefit of (to put
it shortly) an enemy; or may, on the other hand, vest in the
prescribed custodian such enemy property as may be prescribed.
Those are two alternative courses; and I think the fact that they
are expressed in that way indicates that the legislature contem-
plated that an order might require payment of money to the
custodian without thereby vesting any proprietary interest in the
money in the custodian, and that where it was necessary or
expedient that the custodian should be invested with proprietary
rights then that could be done by means of a vesting order.

That distinction is preserved in the main Trading with the
Enemy Order. The first observation I would make about that
Order is that so far as money is concerned it does not use the
expressions one would expect to find in an Order transferring a
proprietary interest in given sums of money to the custodian.
Paragraph 1 (i) deals with “ Any money which would, but for
“ the existence of a state of war, be payable to or for the benefit
“ of a person who is an enemy,” and it does not provide that
such money is to belong to or vest in the custodian. It enacts
that such money “ shall be paid to the custodian.” So far, then,
what seems to me to be done is this: The custodian is given no
proprietary interest, but where there is money due and payable
to a person who, at the time when the money is due and payable,
is an enemy, then the person from whom the money is due is

placed under a statutory obligation to pay the money to the custodian. That state of affairs seems to me to be perfectly consistent with the absence of any proprietary interest in the custodian. Paragraph 1 (ii) goes on to detail the sources from which the money in question may come, and includes "payment arising under any trust, will or settlement." That is item (i) in the list and is the relevant case here. The effect of that is that (apart from the forfeiture provision) the Westminster Bank Ltd., as trustee of the settlement, whenever it became possessed of any income arising from the trust fund in the form of money, fell under a statutory obligation to pay that money to the custodian, provided that at the date when it came to hand and was thus immediately divisible among the income beneficiaries, each of the income beneficiaries was still technically an enemy. Again, I think there is nothing in that which postulates any proprietary interest in the custodian; it is a statutory obligation on trustees when they have money in hand owing to an enemy beneficiary to pay that money to the custodian and not to the beneficiary—not because it is money of the custodian but because it is money of the beneficiary. It is recognized that the title remains in the beneficiary, and it is because the title is in the beneficiary and the beneficiary is an enemy that the statutory obligation to pay the custodian is imposed.

When any money has been paid to the custodian it is true that he has to hold it, under paragraph 3 of the Order, in suspense. He has to hold it, along with any property vested in him under the provisions of any vesting order, "until the termination of the present war, and shall thereafter deal with the same in such manner as the Board of Trade shall direct." He holds the money he receives, and he holds it in suspense in accordance with that provision. But I do not think it follows from the fact that he so holds any money representing income of a trust fund as and when he receives it from the trustees of a settlement, that there has been any vesting in him of the proprietary interest in the income of the trust fund of a beneficiary under the settlement who is an enemy.

Furthermore, as my Lord has pointed out, in this particular case there was never, in fact, any payment at all to the custodian of any of the income. It was, through inadvertence, as it was put in the affidavit in support of the summons, simply held by the bank and, I think, invested. Considering the matter as if the life interests had been given free of any provision for forfeiture, I think the result follows that the income in question,

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never having in fact been paid to the custodian, never became subject to the provisions of paragraph 3 of the Order. It may be that the bank committed a statutory offence in failing to pay this income over, and it may be that the custodian could have sued the bank and demanded the money; but unless and until the money was in fact paid over to the custodian, so far as I can see it remained throughout nothing more nor less than income due to beneficiaries who were enemies during the material period and, as such, income which the bank was under a statutory obligation (which it did not perform) to pay over to the custodian.

I can find no warrant in the Order for holding that the custodian had any proprietary interest in this income. Accordingly, in my view, after giving the best consideration I can to the provisions of the Trading with the Enemy Act, 1939, and the Orders made thereunder, and applying what I conceive to be the true construction of the forfeiture clause, I cannot find that the relevant event has happened upon the happening of which the forfeiture was to take effect. I have not overlooked the fact that by the amending Order of 1941, No. 765, the custodian was given power to sue for and recover any moneys payable to him under the Order. Nor have I overlooked the fact that under paragraph 3 (iv) of the main order the receipt of the custodian for any money paid to him under the Order was to be a good discharge. Notwithstanding these two provisions and notwithstanding the statutory obligation to pay money to the custodian in the circumstances I have mentioned, it does not seem to me that the custodian's powers, rights and duties, important as they were, and taken together perhaps putting him in a position approximating to that of an owner, were such as to confer on him any proprietary right. I think his position fell short of that of a person in whom the income under this settlement or some part thereof would, apart from the forfeiture provision, have been "vested" within the meaning of the appointment.

The decision to which, in my view, we should come is, I should emphasize, a decision which turns on the true construction of this particular forfeiture clause. There may well be clauses so worded that the effect of the Trading with the Enemy Act, 1939, and the Orders made thereunder was to bring about a forfeiture. Examples of that are to be found in the books. There is a case to which my Lord has referred of *In re Gourju's Will Trusts*.²⁰

²⁰ [1943] Ch. 24.

In that case the settlement adopted the protective trusts defined by section 33 of the Trustee Act, 1925, so that forfeiture was to ensue when any event happened whereby, if the said income were payable during that period to the principal beneficiary absolutely, he would be deprived of the right to receive the same or any part thereof. In the face of that language Simonds J. held that the effect of the Trading with the Enemy Act, 1939, and Orders was to bring about a forfeiture because the effect of them was quite plainly to deprive the principal beneficiary of the right to receive the income. But there are no such words in this appointment. Again, Uthwatt J., in *In re Hall*,²¹ had to consider the case of an annuity bequeathed to an annuitant with a provision for forfeiture if she should alienate or charge the annuity or do or suffer any act whereby it might become vested in or payable to any other person. The judge held, and I find difficulty in seeing how he could have held otherwise, that having regard to the fact that the annuitant was living in France the effect of the provisions of the Trading with the Enemy Act, 1939, was that the annuity, if not forfeited, would become payable to the Custodian of Enemy Property; and *prima facie* that meant, I think, that as the annuity would have become payable to the Custodian of Enemy Property, but for the forfeiture clause, the forfeiture clause containing, as it did, the words "vested in or payable to," would have operated. But the judge in that particular case found himself able to escape that conclusion on the strength of the words "do or suffer any act," and he held that the unfortunate events whereby the annuitant had become a technical enemy were neither acts done by her nor acts suffered by her, placing, in the context, on the word "suffer" the meaning "permit." But in this case the words "or payable" are not present. The words are "vested in"; and for the reasons I have given I do not think that the Trading with the Enemy Act, 1939, and orders would have brought about a "vesting" within the meaning of this forfeiture provision.

I may perhaps be excused for referring to the case of *In re Sartoris's Estate*.²² I refer to it for this reason: it provides an illustration of a case where income may become payable to some person other than the income beneficiary, or where some other person than the beneficiary may acquire the right to receive the income, although the income is not vested in that other person. The headnote to the case is: "A testator bequeathed the income

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²¹ [1944] Ch. 46.

²² [1892] 1 Ch. 11.

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" of his residuary estate to his son during his life, or until he
 " should assign or dispose of the income or some part thereof,
 " " or become bankrupt, or do or suffer something whereby the
 " " said income if belonging absolutely to him, or some part
 " " thereof, would become payable to or vested in some other
 " " person.' In October, 1890, a petition in bankruptcy was
 " filed against the son, and in November, 1890, a receiving order
 " was made. A meeting of creditors was held in December and
 " adjourned till January, when it was adjourned again, and
 " nothing further had been done in the matter:—*Held* (affirming
 " the decision of Chitty J.), that though the income did not vest
 " in the official receiver, it would, by force of the receiving order
 " have become payable to him if it had belonged absolutely to
 " the tenant for life, and that the interest of the tenant for life
 " had determined." Chitty J. said ²³: " Now the first point to
 " be ascertained is, the effect of a receiving order under the
 " Bankruptcy Act, 1883. The material sections are the 9th,
 " which provides that 'on the making of a receiving order, an
 " ' official receiver shall be thereby constituted receiver of the
 " ' property of the debtor,' and the 70th section, which defines
 " his duties. Subsection (2) is the more material one, which
 " enacts that for the purpose of his duties as interim receiver,
 " ' the official receiver shall have the same powers as if he were
 " ' a receiver and manager appointed by the High Court.' Upon
 " the Act of Parliament it is quite clear that the debtor's pro-
 " perty does not pass to the receiver; but it is equally clear that
 " it is the duty of the receiver to execute his office, and to
 " receive whatever property the debtor may have. If there is
 " property in the debtor's possession, the receiver intervenes by
 " taking possession for the purpose of protecting the property,
 " and seeing that it reaches its ultimate destination, whatever
 " that may be, according to the result of the bankruptcy pro-
 " ceedings. It being plain that there is no vesting of the debtor's
 " property in the receiver, it follows, and has been decided, that
 " notwithstanding the receiving order the bankrupt alone can
 " bring actions for the recovery of property not in his possession,
 " as for instance a debt due to him at law."

Apart from the circumstances that in the present case the Custodian of Enemy Property was given an express right to sue for money which had become payable to him under the provisions of the Trading with the Enemy Orders, it seems to me that those

²³ [1892] 1 Ch. 11, 13.

observations provide a reasonably close analogy to the present case. The receiver was under a duty to execute his office and to receive whatever property the debtor might have. Nevertheless, the property did not vest in the receiver; the receiver's duty was to take possession for the purpose of protecting the property and seeing that it reached its ultimate destination, whatever that might be. So, too, it might here be said that the custodian was under a duty to receive money due to enemies, and that persons holding money due to enemies were under a statutory obligation to pay that money to him, and the custodian was then to hold it in suspense and see that it reached its ultimate destination, whatever that might be, under whatever directions might ultimately, at the conclusion of hostilities, be given by the Board of Trade.

The case of *In re Sartoris's Estate*²⁴ is, I think, also instructive in another respect. It will be remembered that the words of forfeiture in that case were "payable to or vested in some "other person"; and that for the reasons to which I have referred Chitty J. held that there was no vesting in the receiver. But he drew a sharp distinction between the words "payable "to" and "vested in" and held that the income had become payable to the receiver although it had not become vested in him. That, I think, bears out my observations earlier in this judgment as to the difference in effect of different forms of forfeiture clauses. If, here, the words "or payable to" had been present, or if, here, the event of forfeiture had been defined as deprivation of the right to receive the income or some part thereof, the result would, I venture to think, inevitably have been different. But the words we here have to construe are "vested in"; and for the reasons given by my Lord, and those which I have added (I am afraid at undue length), I am of opinion that there was here no vesting in the custodian within the meaning of the appointment.

MORRIS L.J. I am in full agreement with the judgments which my Lords have delivered.

Appeal allowed.

Solicitors: *Michael Kramer & Co.; Official Solicitor to the Supreme Court; Caprons & Crosse.*

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²⁴ [1892] 1 Ch. 11.

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Mar. 21, 22;

Apr. 7.

[1951 J. 5980.]

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Jenkins and
Morris L.JJ.*Intestacy—Children only possible next-of-kin—Legitimacy or illegitimacy—Evidence as to statements made by intestate—Admissibility—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 32 (1) and (2).*

The common law rule that evidence of a statement (whether oral or in writing) made by a deceased husband or wife relating to the legitimacy or illegitimacy of a child born of the wife during the subsistence of the marriage was only admissible as part of the *res gestae* and was not admissible as evidence of the truth of the facts as stated by the deceased, although it was a declaration of pedigree, was based on the substantive rule of law that neither the husband nor the wife would have been a competent witness for that purpose in judicial proceedings if living. (See *The Aylesford Peerage* (1888) 11 App.Cas. 1, 9, *per* Lord Selborne.)

By section 32 (1) of the Matrimonial Causes Act, 1950, which re-enacts section 7 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949: "Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period." By subsection (2) the husband or wife is not a compellable witness:—

Held, that though this provision is in terms only appropriate to evidence given by a husband or wife in judicial proceedings, this statutory abrogation of the substantive rule of law as regards such evidence necessarily has the effect of abrogating the old rule in the case where the evidence tendered is secondary evidence of a statement made by a husband or wife, since deceased.

The natural interpretation of the language in section 32 is that the evidence of a husband or wife proving that marital intercourse did or did not take place during any period is admissible, whatever form such evidence takes according to the rules of evidence.

Accordingly, to-day, evidence of a statement (oral or documentary) made at any time by a husband or wife, since deceased, *ante litem motam*, as to the legitimacy or illegitimacy of a child born in wedlock is admissible in evidence of the fact stated, as a declaration as to pedigree, notwithstanding that husband or wife could not have been compelled to give evidence of the facts stated in a court of law—for competence, not compellability, is the true test.—

In proceedings involving the question of the legitimacy of a child of a married woman who died intestate, evidence was tendered of statements made by the intestate to the effect that the child was not the child of her lawful husband, and it was sought to put in the birth certificate based on information supplied by the intestate which also tended to prove the child to be illegitimate. Evidence also was tendered of statements of the alleged natural

father, also deceased, to the effect that he was the father of the child:—

Held, (1) that the statements of the mother and the birth certificate were admissible in evidence for the above stated reasons; (2) that the statement of the alleged natural father was admissible as part of the *res gestae*, but not as a declaration of pedigree, or as a statement against interest, as at the time that he made it he had assumed full financial responsibility for the child.

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APPEAL from Sir Leonard Stone, Vice-Chancellor of the County Palatine Court of Lancaster.

Robina Parker and William Henry Jenion were married on July 22, 1900. They lived together for a number of years but the husband left her on discovering that she was having sexual intercourse with James Rooney. She remained in the same house for a time and then she and James Rooney moved to 36, Prospect Street, Liverpool, when he took to calling himself James Jenion. She lived in this house until she died intestate and a widow on November 14, 1949.

Letters of administration to her estate were granted on April 22, 1950, to the defendant, Sarah Anne Wynne, who was her eldest child, born on May 26, 1904. Five other children of the intestate then brought these proceedings against the defendant claiming to be entitled to share in the intestate's estate and asking for an account and administration. These plaintiffs were Joseph Jenion, James William Jenion, Edith Coxon, Catherine Lee and Moireen Murphy, and, except in the cases of James William Jenion and Moireen Murphy, they were shown in their birth certificates as children of the intestate and James Jenion. The first of the plaintiffs to be born was James William Jenion, born on October 27, 1911, and in the birth certificate his father was shown as William Henry Jenion. No other one of the plaintiffs was born before November 6, 1914.

The main question arising was whether any or all of the plaintiffs were legitimate or not and the effect of the evidence is fully stated in the judgments of the judges in the Court of Appeal. The evidence included in that of Mr. Nugent, a cousin of James Rooney, a statement that on his return from service in the Army in 1920 his cousin made a declaration that he was the father of all the children except the defendant and that similar statements were made to him by the intestate. The defendant gave evidence of hearing similar statements when she was very young.

The Vice-Chancellor refused to accept any evidence of the defendant and held that the statements said to have been made

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by the intestate were not admissible in evidence. He therefore found that there was no evidence given by any witness to rebut the presumption that the plaintiff James William Jenion was legitimate; but that, in view in particular of the evidence of Mr. Nugent, the intestate and James Rooney were already living at 36 Prospect Street, where the intestate's husband could have had no access to her, at such a date as to rebut the claims of the other four plaintiffs to be legitimate. The defendant appealed.

Sir Lynn Ungood-Thomas Q.C. and *Joseph Turner* for the defendant. The sole question raised by this appeal is whether the plaintiff James William Jenion was the legitimate son of the intestate. It is submitted first that the Vice-Chancellor misunderstood the evidence and secondly that he was wrong in law in rejecting evidence of statements of the intestate in the past as to the plaintiff's illegitimacy. Before the passing of section 7 of the Law Reform (Miscellaneous Provisions) Act, 1949, now re-enacted as section 32 of the Matrimonial Causes Act, 1950, the evidence of a husband or wife was inadmissible to prove that marital intercourse had not taken place between them during any period. The presumption of access was, however, rebuttable, but not by evidence of a mere probability nor by evidence of the wife's adultery alone. The conduct of the wife and of her paramour with regard to the child, however, was admissible in evidence as part of the *res gestae*. The statement of the wife that her child was illegitimate was not admissible. It is submitted that since the passing of the Act of 1949, the evidence of a wife that her child is illegitimate is admissible. It is submitted that section 32 of the Act of 1950 is retrospective and evidence of the statements of the intestate that this plaintiff was illegitimate should have been admitted by the Vice-Chancellor. The effect of section 32 is to overrule the decision in *Russell v. Russell*.¹ The admissibility of a wife's statement should not depend on whether she is alive or not. Section 32 provides that "the evidence of a husband or wife shall be admissible." That language covers both direct oral evidence and documentary evidence admissible under the Evidence Act, 1938.

Salt Q.C. and *Owen Hughes* for the plaintiff James William Jenion. The Vice-Chancellor was right in refusing to accept evidence of statements by the intestate. Where Parliament intends to make statements of deceased persons admissible in

¹ [1924] A.C. 687.

evidence as declarations it says so expressly as in section 1 of the Evidence Act, 1938. It is submitted that section 32 of the Act of 1950 does not make the statements of a deceased husband or wife admissible for the following reasons. First, so to hold would be to make the husband or wife a compellable witness and section 32 (2) expressly states that they shall not be compellable. Secondly, the section contemplates that the husband or wife will be a living person subject to cross-examination. Thirdly, if the husband or wife is dead, the statement is only admissible as part of the *res gestae*. Here the only documentary evidence is the birth certificate. If the intestate had made a written statement the court might have had a discretion to admit it under the Evidence Act, 1938. The intestate's statements, if admissible at all, are merely admissible as evidence of her conduct under the principle laid down in the *Aylesford Peerage* case.² This is a wholly different case from that. There the statements in question were contained in letters written by the mother. Here the statements are merely oral. If section 32 of the Act of 1950 is given a retrospective operation and oral statements of deceased persons are admissible the result will be to give rise to a number of claims which could not otherwise have been litigated.

Unless section 32 of the Act of 1950 operates to make good the evidence of statements of the intestate, *Russell v. Russell*¹ applies here. The only documentary evidence is the birth certificates, one of which shows James William Jenion's father as the intestate's husband. That is strong evidence of his legitimacy.

[EVERSHED M.R. They are surely not evidence as to legitimacy or illegitimacy.]

Yes, they are admissible in evidence whether or not *Mayo v. Mayo*³ was rightly decided. In *Gordon v. Gordon*⁴ it was said that whenever the husband could have had nuptial intercourse as it is submitted, he could in the case of the conception of James William Jenion, he will be presumed to be legitimate even although all subsequent children of the intestate were illegitimate.

[EVERSHED M.R. It might be said against this that the intestate had gone to Prospect Street before the birth of James William Jenion.]

Even so, it may not have been before his conception. This is not a case where the court is driven to hearsay evidence.

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¹ [1924] A.C. 687.² (1885) 11 App.Cas. 1.³ [1949] P. 172.⁴ [1903] P. 141.

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Sir Lynn Ungood-Thomas in reply referred to *Lauder v. Lauder*⁶ and *Battle v. Attorney-General*.⁷

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Cur. adv. vult.

April 7. Their Lordships read the following judgments:—

EVERSHED M.R. The late Robina Jenion, née Parker (hereafter called “the Intestate”) was married on July 22, 1900, to William Henry Jenion, described in the marriage certificate as a carter. She was then 18 and her husband 20. She died on November 14, 1949, having survived her husband by 16 years. She left (perhaps surprisingly in the circumstances) an estate of the value of £2,400 and letters of administration to her estate were duly granted to the defendant.

For some time it is not in dispute that the intestate and her husband lived normally together in the city of Liverpool as husband and wife. At some date—and so far as it can be accurately ascertained it is of the utmost importance to fix it—one James Rooney, a dock labourer, who had supplanted her husband in the intestate’s affections and enjoyed their advantages during the husband’s absences at work, was caught by the husband in the intestate’s embraces when the former returned unexpectedly from work. The injured Mr. Jenion forthwith departed from the matrimonial home, and James Rooney stepped at once into his place. At some time—again the date is important in so far as it can be fixed—the two of them, James Rooney and the intestate, moved to No. 36, Prospect Street, in the same city of Liverpool, and in that house the intestate remained at all material times during her life. The judgment of the Vice-Chancellor has established that the first, third and fourth plaintiffs were all (and there were more of them as well) issue of the union between the intestate and James Rooney. As to the last plaintiff, it appears that about the year 1925 James Rooney suffered the same fate which he had imposed himself upon William Henry Jenion—he was himself supplanted in the intestate’s affections by an Irish labourer, a lodger in their house; and the last plaintiff (according to the Vice-Chancellor) was the issue of the intestate by her Irish lover. It is not the least strange part of the somewhat squalid history that each one of the intestate’s children, so far as the

⁵ [1935] Ch. 605.

⁷ [1949] P. 358, 361.

⁶ [1949] P. 277, 308.

evidence goes, was registered (with variations to which I must later refer) as a child of a father of the name of Jenion; for it appears that, for this purpose—and perhaps also to preserve appearances in Prospect Street—the succeeding partners of the intestate's life were content to be known in the district in which they lived by the intestate's married name of Jenion.

The story of the somewhat turbulent life of the intestate is, then, remarkable. If she was inconstant, she was prolific. The period of her child-bearing extended for about a quarter of a century. During this period she bore a large number of children. The exact number is unknown, but it is stated to have been not less than twelve or thirteen. Of this large number the five plaintiffs and the defendant are the only known survivors, and the question raised in these proceedings was the simple one: Which of the six are entitled to participate in their mother's estate? The claim of the plaintiffs was, that either they were all legitimate or all illegitimate, and that in any event (in the latter alternative by virtue of section 9 (1) of the Legitimacy Act, 1926) all were entitled to share. The Vice-Chancellor had no difficulty in finding as a fact that the defendant was legitimate, but that all the plaintiffs (other than the second, James William Jenion) were not; and so held that the intestate's estate was equally divisible between the second plaintiff and the defendant. There is no appeal against any of the findings of the Vice-Chancellor save only his conclusion that the defendant failed to establish the illegitimacy of James William Jenion, the respondent in this court. It is the case of the defendant (presented to us by Sir Lynn Ungood-Thomas) that the only proper inference from the admissible evidence is that the second plaintiff was, like his co-plaintiffs, not the lawful child of the intestate and her husband, William Henry Jenion.

There is no doubt of the law to be applied. In the course of his careful judgment the Vice-Chancellor quoted substantially from the judgment of Luxmoore J. in *In re Bromage*,⁸ and I need not repeat the citations. Since all the children born to the intestate were born in fact during the lifetime of her husband, William Henry Jenion, the onus is on the defendant in challenging the legitimacy of the respondent to prove, and to prove beyond reasonable doubt, that at the time of his conception the husband had in fact no access to the intestate—no access, that is to say, in the sense in which in cases such as the present that word is

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used—no sexual intercourse with her. In the case of all the plaintiffs save the second the Vice-Chancellor so concluded; but as regards the second plaintiff (the respondent) the view of the Vice-Chancellor was that the admissible evidence fell short of what was required by the standards to which I have referred.

The relevant evidence before the Vice-Chancellor consisted of that of the defendant herself, of one James Nugent, a police officer, who was a second cousin of James Rooney, and of Mrs. Barratt, a neighbour in Prospect Street. As regards Mrs. Barratt, she did not move to Prospect Street till the year 1914, and she could not, therefore, speak of events relative to the legitimacy of the respondent, who was born on October 22, 1911. As regards Mr. Nugent, the Vice-Chancellor stated that he regarded him as a reliable witness. Mr. Nugent said that he began to visit the intestate and James Rooney and to see them regularly when he was "about 12 years of age." Since at the date of the trial (October, 1951) Mr. Nugent was 53, this starting date (so to say) goes back to about 1910. In the course of his judgment the Vice-Chancellor places this date at 1911—too late, having regard to the fact that the respondent, according to the ordinary course of natural events, would have been conceived in January 1911, for the purpose of the defendant's case. Sir Lynn has criticized the judgment in regard to this piece of arithmetic; but, even if the Vice-Chancellor was unduly cautious in this matter, it is, I think, obvious that the starting date of Mr. Nugent's experience is too imprecise to justify this court, on that account alone, in taking a different view from the Vice-Chancellor on the effect of the evidence as a whole.

As regards the defendant herself, her evidence consisted both of her recollections of early childhood and also of statements or declarations bearing directly upon the matter in hand made in her presence, both by the intestate and James Rooney. The Vice-Chancellor said that he regarded the defendant (who was, of course, materially interested in the result of the trial) as an unreliable witness. He also expressed the view that her evidence of declarations by the intestate and James Rooney (as also the evidence of Mr. Nugent of similar declarations) was wholly inadmissible. There is, to my mind, force in Sir Lynn's criticism that the Vice-Chancellor's rejection of the defendant's credibility (to some extent on the ground that her early youth, having been plainly unhappy, had been also forgotten) was related only to the recollection she expressed of her early infancy. I do not, however, think it right, having regard to what the Vice-Chancellor said

of the defendant as a witness, for this court to give weight (save in so far as it is corroborated) to any part of the defendant's evidence. But there still remains the evidence of Mr. Nugent, regarded by the Vice-Chancellor as reliable, of like declarations. If, as the Vice-Chancellor held, such declarations were wholly inadmissible, then there was indeed little or nothing beyond the defendant's own evidence sufficient to distinguish the case of the respondent from that of his co-plaintiffs; for the Vice-Chancellor regarded the various birth certificates produced before him as being (upon the same principle as applied to the declarations) inadmissible as evidence of the facts stated therein or to be deduced therefrom in so far as they tended to disprove legitimacy.

As regards the plaintiffs (other than the respondent) the Vice-Chancellor said: "In my opinion these facts do establish that for many years before September 20, 1926"—which is the date of the birth of the last of the intestate's children—"there was no access to the body of the intestate by her husband. The circumstances in which she was living precluded any such act as being possible without a number of people knowing about it, and, far from anyone knowing about any such thing, the evidence is entirely negative. But the question remains: Since what date was such a state of affairs in existence? Mr. Nugent's visits to 36, Prospect Street, only go back to the year 1911; Mrs. Barratt only came to live at No. 33 in 1914. There is no acceptable evidence as to when the intestate and James Rooney first went to live in Prospect Street as if they were man and wife." As I think, however, the evidence given by Mr. Nugent of declarations made in his hearing is (if admissible) in all the circumstances sufficient to turn the scale and to answer the question posed by the Vice-Chancellor so as to place the beginning of the "state of affairs" to which he alludes beyond reasonable doubt, sufficiently prior to the conception of the respondent as to justify the conclusion that (in accordance in fact with these declarations) the defendant is the only legitimate child of the intestate. As I have indicated, I accept the view of the Vice-Chancellor that once the menage at 36, Prospect Street, began the circumstances or "state of affairs" were such as to preclude any access to the body of the intestate by her husband being possible in fact. I do not forget that until the outbreak of the First World War William Henry Jenion appears to have still resided in Liverpool—in fact (for a time at least) with the mother of the intestate. It is therefore said by Mr. Salt that

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being so close in Liverpool it is not indeed unlikely that the intestate visited her mother's house and therefore visited her husband from time to time after the separation. And I do not forget that the question is not whether husband and wife were, in ordinary language, separated, or whether they were on terms of amiability, but whether in fact the husband had access to the body of the wife. But Mr. Nugent, who knew both the intestate and his second cousin, James Rooney, intimately, deposed to the fact that when the intestate left Prospect Street and went visiting she was accompanied by Mr. Rooney; and I can see no ground for differing from the conclusion of the Vice-Chancellor after hearing all the evidence that once the establishment had been set up at Prospect Street there was in fact thereafter no access on the husband's part to the body of the intestate. It seems to me, therefore, that if upon proper evidence it is proved that the establishment in Prospect Street was set up sufficiently early to be prior to the date of the respondent's conception then there is no ground for distinguishing (and the Vice-Chancellor would not himself have distinguished) the case of the respondent from that of his co-plaintiffs, or from concluding that, with reasonable certainty at the time of the respondent's conception, there was in fact no access by the husband to the intestate's body.

In the circumstances it will, I think, be convenient first to consider whether the Vice-Chancellor was correct in his view that none of the declarations made by the intestate or by James Rooney were admissible at all as evidence in the present case. And I will first confine myself to the declarations attributed to the intestate. In my judgment the Vice-Chancellor was incorrect in his conclusion that evidence of these declarations was inadmissible. On any view these declarations must, as I think, have been admissible on the issue of legitimacy as part of what is called the *res gestae*, that is, evidence not of the facts stated in the declarations but of the fact that such statements were made. This conclusion follows, I think, inevitably from the *Aylesford Peerage* case.⁹ I agree, however, that these declarations, if only admissible to that limited extent, must of necessity carry relatively little weight. In my opinion, however, the effect of section 7 of the Law Reform (Miscellaneous Provisions) Act, 1949, now section 32 of the Matrimonial Causes Act, 1950, is to make such declarations evidence directly of the facts therein stated. Subsections (1) and (2) of that section are as follows:

⁹ 11 App.Cas. 1.

“(1) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period. (2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.”

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Mr. Salt’s argument for the respondent, which was accepted by the Vice-Chancellor, was that subsection (1) only made admissible for the purpose specified evidence given orally by a husband or wife. In support of this argument he relied first on the opening formula: “Notwithstanding any rule of law”—the effect of which is (he contended) to relax what he said was the general rule against the reception of evidence from a husband or wife relating to marital intercourse only to the extent of admitting such evidence when given orally in the witness box. And Mr. Salt found support for this view in the second subsection which, according to its natural sense, could only be applicable to oral evidence. If this argument is correct it follows that evidence of declarations made, whether oral or written, by a deceased husband or wife to prove the absence of marital intercourse, would remain (as the Vice-Chancellor held them to be) inadmissible to prove that fact.

I have reached a different conclusion. In my judgment the natural interpretation of the language is that in any proceedings after the coming into force of the new legislation, evidence of a husband or wife proving that marital intercourse did or did not take place during any period is admissible, whatever form such evidence takes according to the ordinary rules of evidence. The words used are “the evidence” not “the oral evidence.” To contrast evidence on the one hand with declarations on the other is to contrast the whole with that which it comprehends: for “declarations” are but a kind of evidence which may or may not be admissible according to the general rules of evidence. If the evidence of a husband or wife is admissible for the specified purpose then I cannot think that such evidence was intended to be subject to some special limitation or not to be in other respects conformable to the general law so as to exclude, for example, the power of the court to admit under the Evidence Act, 1938, a written statement by a spouse suffering from mental incapacity. To have imposed upon the evidence rendered admissible by subsection (1) limitations of that character would, in my view, have required clear words, and possibly an elaborate formula.

It has long been held that in pedigree cases hearsay evidence

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 1952 better evidence would not be available. In the *Aylesford Peerage*
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v. ". . . on the *lis mota* principle, but on the principle that the
 WYNNE. "mother would not for that purpose have been a competent
 Evershed M.R. "witness herself, if living."¹⁰

In my judgment, if, as a result of the recent legislation, the mother has become for the purpose a competent witness if living it follows that the objections to the reception of her written declarations after her death are necessarily removed. The "rule of law" referred to in the opening words of the subsection is the rule (and I take the language of the headnote in *Russell v. Russell*¹¹), "that neither a husband nor a wife is permitted to "give evidence of non-intercourse after marriage to bastardize a "child born in wedlock." By the opening words of the subsection in question Parliament meant no more, in my view, than to say that notwithstanding the existence of that rule (the authority of which, as laid down by the courts, it recognized up to the passing of the Act) the evidence of the husband or wife should thenceforth be admissible for the specified purpose of proving that marital intercourse did or did not during any period take place.

Nor do I think that Mr. Salt's argument is assisted by the second subsection. It is true that the second subsection can only relate to cases in which the husband or wife is living and therefore capable of giving evidence orally and in person. But the subsection is, in my opinion, only designed, naturally enough, to protect a husband or wife from the embarrassment and distaste of having to go into (and be cross-examined upon) matters of such peculiar intimacy in a court of law, unless he or she is willing to undergo the ordeal. The obvious consideration underlying the subsection can have no sensible relevance in the case of declarations by deceased spouses. Nor do I think, with all respect to him, that there is much substance in the Vice-Chancellor's fear that the view which I have formed is likely to cause to be agitated or re-agitated stale claims to titles or inheritances. As I have already stated, declarations of the kind here in question were always admissible as part of the *res gestae*, and if any claim

⁹ 11 App.Cas. 1.

¹¹ [1924] A.C. 687.

¹⁰ Ibid. 10.

had been agitated before the passing of the new legislation its re-agitation would now be prevented, *prima facie*, by the doctrine of *res judicata*. I therefore conclude that as a result of the Law Reform (Miscellaneous Provisions) Act, 1949, and the Matrimonial Causes Act, 1950, the evidence of Mr. Nugent (and of the defendant) of declarations made by the intestate to the effect that the respondent was not her lawful child, are admissible as direct evidence of that fact. It follows also that whether or not *Mayo v. Mayo*¹² was at the time rightly decided (see *Perring v. Perring*¹³), the statements contained in the various birth certificates, for which the intestate was as informant responsible, are similarly admissible as evidence to the same effect.

As regards the declarations made by James Rooney that of all the children living at Prospect Street only the defendant was the child of William Henry Jenion different considerations may apply. James Rooney's relationship to any of the plaintiffs was that of natural father, if in fact he or she was his child. In *Battle v. Attorney-General*¹⁴ Hodson J. held, following the decision of Langton J. in *In re Davy*,¹⁵ that declarations by the father of a man alleged to be the natural father of a particular individual were admissible in evidence upon the question of that individual's legitimacy. Whether or not this is so, at least James Rooney's statements would, in my judgment, be admissible as part of the *res gestae*. His declarations would not, however, in my judgment, be admissible as direct evidence of paternity upon the ground that they were declarations against interest; for at the time they were made Rooney was living at Prospect Street with the intestate as man and wife and had assumed responsibility for the maintenance of all the children legitimate and illegitimate alike; so that his pecuniary interest was after the declarations left exactly where it had been before. Nor does his statement, "I am the father," satisfy the condition that the fact is one of which he has peculiar or direct personal knowledge. (See *per* Hamilton L.J., delivering the judgment of the Court of Appeal in *Lloyd v. Powell Duffryn Steam Coal Co. Ltd.*¹⁶) But the House of Lords, in the same case,¹⁷ while accepting the view of the Court of Appeal, held that declarations of a putative father were admissible on the issue of paternity as part of the *res gestae*. Still, as evidence of paternity, Rooney's declarations cannot in any case be of great weight, and I do not attach more significance

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¹² [1949] P. 172.¹³ [1949] 2 All E.R. 334.¹⁴ [1949] P. 358.¹⁵ [1935] P. 1.¹⁶ [1913] 2 K.B. 130, 141.¹⁷ [1914] A.C. 733.

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to them than as lending some (though slight) corroboration to the declarations proved to have been made by the intestate.

It will be convenient now to refer to the birth certificates. The first birth recorded is that of a daughter born in August, 1902, in Rathbone Street, Liverpool. The name of the father is given as William Henry Jenion, therein described as "Labourer in Dye Works." It is not in dispute that this child was the lawful child of Mr. and Mrs. Jenion, and that she died in early infancy. The next is that of the defendant herself, born in May, 1904. The father is described as William Henry Jenion, carter, and, as I have said, the Vice-Chancellor found as a fact that she was legitimate. There follow the birth certificates of the five plaintiffs, beginning with the birth of the respondent in 1911 and ending with that of the fifth plaintiff in 1926, together with the certificates of the birth of four more children at various dates between 1911 and 1926, all of whom died in infancy. The birth of each of these nine children is recorded as having occurred at 36, Prospect Street, and in each case the occupation of the father is stated as having been that of a dock labourer, the occupation which was, according to the evidence, consistently followed by James Rooney. In every case the father's surname was given as Jenion, but it is, on the other hand, a significant fact that the father's Christian names in the case of the respondent and of the child next born (a boy, John Joseph, who was born in 1913 and soon died) and also in the case of the fifth plaintiff, the last of the series, were given as William Henry, whereas in the case of the other six children the father's Christian name was given as "James." It is now admitted that by James Jenion was meant James Rooney, and the Vice-Chancellor held that the explanation of the use of the name William Henry Jenion in the case of the last plaintiff (who was the issue of the intestate's association with the Irish lodger) is to be found in the fact that the intestate was in the circumstances reluctant to use the name she had attributed to James Rooney and fell back upon that of her lawful husband, though he had long since left Liverpool and was then in fact living in London, where he died.

The explanation of the use of the name of William Henry Jenion in the case of the first two children born in Prospect Street, the respondent and John Joseph, is much more difficult. To the natural suggestion that it indicated the legitimacy in fact of the two boys it is objected that though the intestate's husband followed more than one calling—"carter" and "labourer in dye works" have been already noted, and when he died in London

he was described in the certificate of his death as a "bacon warehouseman"—he never at any time, according to the evidence, followed James Rooney's occupation of a dock labourer. Moreover, the date of the birth of the second child (June, 1913) and consequently the date of his conception were in any case after the time when, according to the Vice-Chancellor's findings, the establishment at Prospect Street had started and the "state of affairs" had arisen such as excluded access of William Henry Jenion to the body of the intestate.

Sir Lynn has accordingly argued that the use of the name William Henry Jenion in the first two of these birth certificates signifies no more than that the intestate, for the purpose of registering the births of her children, clung for some time after she had wholly separated from her husband to the name of the man to whom she was married—as she reverted to it in 1926 after the birth of the offspring of her association with the Irish lodger. In my opinion the evidence of these certificates, taken as a whole, tends rather to support the defendant's case than the contrary. But I agree with the Vice-Chancellor that this evidence, together with that of Mr. Nugent and of the defendant, but excluding the evidence of the declarations made by the intestate, corroborated (for what they are worth) by the declarations of James Rooney, would not suffice to discharge the onus laid upon the defendant. But, in my judgment, the case takes on an entirely different complexion when regard is had to the proved declarations of the intestate and James Rooney. I need not refer to the evidence itself, for it is quite clear from Mr. Nugent's evidence that statements were made to him both by the intestate (who, as he said, made no secret of the matter) and by James Rooney, before the birth of the last plaintiff, that all the children living at Prospect Street save "Cissy" (meaning the defendant) were their children, and that only "Cissy" was the lawful issue of the intestate's marriage. The defendant gave evidence no less clear of declarations made to her to the same effect both by her mother and by Rooney; and though, as I have said, the defendant was regarded as unreliable, particularly in her recollections of early childhood and the move to Prospect Street, in this respect she was at any rate corroborated by Mr. Nugent. And in judging of the significance of this evidence there is another (as I think) important matter. It is clear that in addition to the children whose births were recorded in the certificates before the court there was (amongst others) another child, Robina, born not long before the respondent, who lived

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to maturity and was living at Prospect Street at the time the declarations were made to which Mr. Nugent and the defendant deposed. It is unfortunate that the birth certificate of this child Robina was not forthcoming. But if the evidence of Mr. Nugent as regards the intestate's declaration to him (to refer only to this matter) is true—and the judge regarded him as a truthful witness—it follows that the children other than “Cissy” to whom the intestate alluded included a child born before the respondent; and, therefore, that the Prospect Street establishment and the “state of affairs” to which the Vice-Chancellor referred originated at a date substantially anterior to the time when the respondent must have been conceived.

On this evidence, therefore, when added to the other indications in the case, I feel, for my part, no doubt that the matter which the Vice-Chancellor obviously regarded as doubtful and difficult, and which he would, as I read his judgment, have decided otherwise than he did if the evidence which he excluded be admissible, must be resolved in the defendant's favour, that is, that upon the issue of legitimacy no valid distinction can be drawn between the case of the respondent and that of his co-plaintiffs; in other words, that the defendant has proved beyond reasonable doubt that the respondent was not the lawful issue of the intestate.

I think, therefore, that the appeal ought to be allowed and a declaration made to the effect that the defendant is the only lawful issue of the intestate and as such entitled solely to her estate.

JENKINS L.J. Robina Jenion (hereinafter called “the “intestate”) died in Liverpool a widow and intestate on November 14, 1949, leaving her surviving the six parties to this action, of whom she was admittedly the mother. On April 22, 1950, the defendant, Sarah Ann Wynne (formerly Jenion), was granted letters of administration to the estate of the intestate out of the Liverpool District Probate Registry, and she claimed to be beneficially entitled to the whole of the residuary estate on the ground that she was the only surviving lawful child of the intestate. In these circumstances the five plaintiffs commenced the present action in the Palatine Court of Lancaster contending that they also were lawful children of the intestate and claiming administration of her estate. The defendant by her defence denied the legitimacy of the five plaintiffs, who (in effect) alleged in reply that if the plaintiffs and the defendant were not all of

them lawful children of the intestate then none of them was a lawful child of hers. an alternative state of facts which if made good would, having regard to section 9 of the Legitimacy Act, 1926, have produced the same result as if they had all been lawful children of the intestate, inasmuch as on this hypothesis the intestate would have left no legitimate issue her surviving.

The formal issue when the matter came before the Vice-Chancellor, therefore, was (in effect) whether all or any and, if so, which of the six parties were lawful children of the intestate. But it appeared at the outset that the legitimacy of the defendant was in fact unquestionable, and the substantial issue therefore was whether in addition to the defendant all or any and, if so, which of the five plaintiffs were or was the lawful children or child of the intestate. It is not in dispute that all five plaintiffs were born to the intestate during the subsistence of her marriage to one William Henry Jenion which took place on July 22, 1900. The defendant, unquestionably a child of this marriage, was born on May 26, 1904. Of the five plaintiffs the eldest, James William Jenion, was born on October 27, 1911, and the youngest, Moireen Murphy (formerly Jenion) was born on July 21, 1926. The intestate's husband, William Henry Jenion, did not die until July 7, 1933.

In these circumstances there was a presumption with respect to each of the five plaintiffs that he or she was a lawful child of the marriage of the intestate to William Henry Jenion. As appears from the fifth answer of the judges in the *Banbury Peerage* case,¹⁸ and the speech of Lord Lyndhurst in *Morris v. Davies*,¹⁹ the citations from which contained in the passages from the judgment of Luxmoore J. in *In Re Bromage*²⁰ were referred to in the Vice-Chancellor's judgment in the present case, I need not repeat at length, that this presumption is only to be rebutted by evidence proving beyond reasonable doubt that no sexual intercourse took place between the husband and the wife at any time when by such intercourse the husband could, by the laws of nature, be the father of the child; and (*per* Lord Lyndhurst in *Morris v. Davies*²¹): "that presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive."

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¹⁸ (1811) 1 Sim. & St. 153.¹⁹ (1837) 5 Cl. & Fin. 163, 259.²⁰ [1935] Ch. 605.²¹ 5 Cl. & Fin. 163, 265.

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The Vice-Chancellor held (in effect) that on the admissible evidence in the present case the presumption of legitimacy was not rebutted as regards the plaintiff James William Jenion, but was rebutted as regards the other four plaintiffs, Joseph Jenion, Edith Jenion (now Coxon), Catherine Jenion (now Lee) and Moireen Jenion (now Murphy). Accordingly by his order dated October 8, 1951, the Vice-Chancellor declared that the plaintiff, James William Jenion, and the defendant were the persons who on the death of the intestate became entitled to any property of hers as to which she died intestate; and directed the usual administration accounts and inquiry, but, except as to the account of debts, not to be prosecuted without his leave in person. There is no appeal by the unsuccessful plaintiffs, but the defendant appeals (in effect) on the ground that the presumption of legitimacy should have been held rebutted as regards all the plaintiffs so as to leave the defendant solely entitled to the residuary estate of the intestate as the only legitimate child of the intestate her surviving. The contest is therefore now confined to the defendant and the plaintiff, James William Jenion, who is the only respondent, and the question in the appeal is whether the presumption of legitimacy was rightly held by the Vice-Chancellor not to have been rebutted in his case.

It will be convenient next to state the undisputed facts of the matter. As I have said, the intestate and William Henry Jenion were married on July 22, 1900. The certificate of their marriage describes him as William Henry Jenion, aged 20, bachelor, and by profession a carter, and her as Robina Parker, aged 18, spinster, and both as of College Lane, Liverpool. The following births of children to the intestate were proved by certificates or from entries in the register: (1) On August 23, 1902, at 14 Court Rathbone Street, Liverpool, Mary Esther, the father being described as William Henry Jenion, labourer in dye works. This child died in infancy. (2) On May 26, 1904, at 10 Rathbone Place, Liverpool, the defendant, Sarah Ann, the father being described as William Henry Jenion, carter. (3) On October 27, 1911, at 36 Prospect Street, Liverpool, the plaintiff, James William, the father being described as William Henry Jenion, dock labourer. (4) On June 13, 1913, at 36, Prospect Street, Liverpool, John (since deceased), the father being again described as William Henry Jenion, dock labourer. (5) On November, 6, 1914, at 36, Prospect Street, Liverpool, the plaintiff, Edith, the father being described as James Jenion, dock labourer. In all the remaining registrations of births the address is given as 36

Prospect Street, and in all of them (except the last) the father is described as James Jenion, dock labourer. The remaining registrations of births are :—(6) On July 23, 1916, the plaintiff Joseph; (7) On August 21, 1919, Paul (since deceased); (8) On December 27, 1920, the plaintiff Catherine; (9) On September 22, 1922, Hugh (since deceased); (10) On July 24, 1924, Constance Ann (since deceased); (11) On July 21, 1926, the plaintiff Moireen. the father in this case being once more described as William Henry Jenion, dock labourer. This formidable list of registered births admittedly does not include all the intestate's children; and, in particular, it is common ground that there was a daughter, Robina, no registration of whose birth has been traced, but who was born in 1908 or 1909 and died at the age of about 20. As I have said, William Henry Jenion, the husband of the intestate, died on July 7, 1933. The certificate of his death shows him to have died in London and states his occupation at that time as "bacon warehouseman." At some date between the birth of the defendant at 10 Rathbone Place on May 26, 1904, and the birth of the plaintiff, James William Jenion, at 36 Prospect Street on October 27, 1911, the intestate parted company with her husband and set up house at 36 Prospect Street with one James Rooney, a dock labourer, and she and Rooney lived together at that address as man and wife for many years, that is to say, down to the death of James Rooney in 1930, or at all events down to a date subsequent to the birth on July 21, 1926, of the plaintiff Moireen Murphy. There seems to be no doubt that during the Prospect Street period James Rooney commonly used the name of Jenion in place of Rooney and was accepted by the neighbourhood generally as the intestate's husband, "James Jenion."

The Vice-Chancellor held, and I see no reason for differing from him in this, that the evidence sufficed to rebut the presumption of legitimacy as regards the children of the intestate conceived after the date on which the intestate and Rooney had set up house together at 36 Prospect Street, inasmuch as there was on the evidence no reasonable possibility of the intestate's husband having had access to her after that date. That finding clearly concluded the case against all the plaintiffs other than James William Jenion, for there is no doubt that the intestate and Rooney had set up house together at 36 Prospect Street before his birth on October 27, 1911, and the eldest of the remaining plaintiffs, Edith, was not born until November 6, 1914. But had the intestate and Rooney set up house together at 36 Prospect Street before the date at which in the ordinary

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course of events the plaintiff James William Jenion must have been conceived, that is, in January, 1911? The Vice-Chancellor held (in effect) that the admissible evidence did not suffice to prove this beyond reasonable doubt.

So far as material for the present purpose the evidence before the Vice-Chancellor and the questions of admissibility arising thereon were as follows: (i) The oral evidence of the defendant as to (a) events within her own recollection, and (b) statements made to her by the intestate and by Rooney. The Vice-Chancellor did not regard the defendant as a reliable witness in either respect, and held that in any case her evidence as to statements made to her by the intestate was inadmissible as those statements tended to bastardize the intestate's children born during her marriage and were therefore inadmissible on the principle stated in *Russell v. Russell*,²² notwithstanding section 7 of the Law Reform Act, 1949, and the re-enactment of subsections (1) and (2) of that section contained in section 32 of the Matrimonial Causes Act, 1950. The Vice-Chancellor did not, I think, express any opinion as to the admissibility of the defendant's evidence of statements made to her by Rooney. (ii) The oral evidence of one James Nugent, a police constable and second cousin of James Rooney. The Vice-Chancellor accepted his evidence as reliable. It included evidence of statements made to the witness by the intestate (which the Vice-Chancellor held to be inadmissible on the ground above stated), and also of statements made to him by Rooney to which the Vice-Chancellor referred in his judgment, without, I think, expressing any view as to their admissibility. (iii) The oral evidence of a Mrs. Barratt, whose knowledge only went back to 1914, and whose evidence, therefore, had no material bearing on the legitimacy of the plaintiff, James William Jenion, apart from her account of a conversation or conversations with the intestate to which counsel for the plaintiff, James William Jenion, attached some importance. (iv) Documentary evidence in the shape of the birth certificates and entries in the register of births. Inasmuch as the intestate herself was the informant in all these cases, the Vice-Chancellor held this evidence to be inadmissible on the ground already stated in so far as it tended to bastardize any of the plaintiffs.

Before considering the evidence in greater detail I will deal with the question of the admissibility of the evidence of the defendant and Mr. Nugent as to the statements made to them

²² [1924] A.C. 687.

by the intestate, of the documentary evidence of statements made by her in the shape of the registered particulars of the births of her children, and of the evidence given by the same two witnesses as to statements made by Rooney. So far as the statements (oral or documentary) by the intestate herself are concerned the law, as I understand it, may be thus summarized: (i) Statements oral or documentary made by a deceased person *de jure* related by blood or marriage to a particular family on questions concerning the pedigree of that family are admissible in evidence under an exception made, owing to the necessity of such cases, from the general rule as to the inadmissibility of hearsay evidence; but (ii) direct evidence of a husband or wife (by which expression I mean evidence given by a husband or wife in person in a judicial proceeding, whether orally or by affidavit or by any other means permitted under the relevant rules of procedure) tending to bastardize a child born to the wife during the subsistence of his or her marriage, was formerly inadmissible on the principle stated in *Russell v. Russell*,²² but was made admissible by section 7 (1) of the Law Reform (Miscellaneous Proceedings) Act, 1949, now re-enacted as section 32 (1) of the Matrimonial Causes Act, 1950. (iii) On the same principle, down to the commencement of the Law Reform Act, 1949, the indirect evidence of a husband or wife (by which expression I mean evidence of the terms of some statement oral or documentary made by the husband or wife dehors the relevant judicial proceeding and proved in that judicial proceeding by the evidence of some third party, or, in the case of a document proving itself, by production of the document) though admissible in other respects (for example, as a statement by a deceased husband or wife as to pedigree, or as an admission by a living husband or wife as party to an action) was inadmissible in so far as it tended to the result mentioned in (ii) above.

This leaves open the question whether such indirect evidence of a husband or wife, if admissible in other respects, has now been made admissible notwithstanding the rule in *Russell v. Russell*²² by the statutory provisions above referred to, which have clearly abrogated that rule so far as the direct evidence of a husband or wife is concerned. Section 32 (1) and (2) of the Matrimonial Causes Act, 1950, re-enacting section 7 (1) and (2) of the Law Reform Act, 1949, are in these terms: “(1) Notwith-

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“shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period. (2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.” It is reasonably plain that these provisions are in terms appropriate to direct evidence given by the husband or wife personally in the proceedings in question orally or by affidavit or other permitted means, rather than to secondary evidence of some statement or admission made by him or her dehors the proceedings.

Nevertheless I think the right view must be that this statutory abrogation of the rule in *Russell v. Russell* ²² as regards the direct evidence of a husband or wife necessarily had the effect of also abrogating the rule with respect to such indirect evidence of a husband or wife as would have been admissible apart from the rule. In the *Aylesford Peerage* case ²³ Lord Selborne said: “We know that unless given post litem motam and for a special purpose which might exclude them, the declarations of deceased members of a family (and I am not at all aware that the mother would be excluded) are admissible in evidence for the purpose of proving relationship. Therefore declarations of that kind by the mother would have been admissible on that principle, if not excluded upon the other principle; and the Vice-Chancellor held that such declarations could not be received for the purpose of proving the legitimacy of the child, which was in controversy; not, as I understand, on the *lis mota* principle, but on the principle that the mother would not for that purpose have been a competent witness herself, if living.” Then he went on: “I accede to that.” This passage seems to me to show that the only reason why the indirect evidence of a deceased husband or wife admissible in other respects was inadmissible in so far as it tended to bastardize children born during his or her marriage was that the husband or wife if living would not have been competent to give evidence to the like effect. In other words, while the rule stood, to admit the indirect evidence of a husband or wife as to non-access would have been to admit in indirect form evidence which in direct form would not have been admissible. It seems to me to follow that now that the direct evidence of a husband or wife as to non-access has been made admissible by statute, his or her indirect evidence to the like effect, provided it is admissible

²² [1924] A.C. 687.²³ 11 App.Cas. 1, 9, 10.

in other respects, must also be admissible, inasmuch as the reason for its exclusion which formerly obtained has ceased with the abrogation of the rule in *Russell v. Russell* ²⁴ in relation to direct evidence. Cessante ratiō cessat ipsa lex.

Accordingly I think that the evidence of the defendant and of Mr. Nugent in the present case as to the terms of statements made to them by the intestate which tend to show what issue she had of her marriage to William Henry Jenion is admissible as evidence of the truth of the facts so stated by the intestate, even though such statements also tend to bastardize children born during her marriage to him, because: (i) they are statements concerning the pedigree of the Jenion family made by a person competent to make them as the wife of William Henry Jenion and the mother of the legitimate issue of her marriage to him; and (ii) the objection to their admissibility in so far as they tend to bastardize children born during her marriage to William Henry Jenion, which would undoubtedly have excluded them before the commencement of the Law Reform Act, 1949, based as it was upon the inability of the intestate if living to have given direct evidence to the like effect, has been abrogated by section 7 (1) of that Act as now re-enacted by section 32 (1) of the Matrimonial Causes Act, 1950.

The Vice-Chancellor, who took a different view, considered (in effect) that these statutory provisions only abrogated the rule in *Russell v. Russell* ²⁴ to the extent of admitting the direct evidence of a living husband or wife, and that to treat them as extending to admit the indirect evidence of a deceased husband or wife, in the form of statements made before the change in the law, would be to give them a retroactive effect which he declined to attribute to them. He was impressed by the possibility of the reopening of old pedigree and peerage cases if the change in the law was held to make admissible such past and previously inadmissible statements.

To my mind, the admissibility of such indirect evidence follows, for the reasons I have endeavoured to state, from the admissibility of direct evidence to the like effect. As to the danger of reopening past controversies, I confess I am less impressed by this possibility than the Vice-Chancellor seems to have been; and in any case the admissibility of evidence for any particular purpose in any particular proceeding must, in my view, be judged by reference to the law of evidence as it stands at the date at which the question

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of admissibility falls to be determined. Thus under the Evidence Act, 1938, a written statement by a deceased person complying with the various conditions of admissibility prescribed by the Act would, I apprehend, be admissible in any proceedings taken after the commencement of the Act, although it was made, and the person making it died, before that commencement, and although as the law stood when it was made, and when the person making it died, it would not have been admissible.

A point was sought to be made of the provision in subsection (2) to the effect that a husband or wife is not to be compellable to give evidence of the kind mentioned in subsection (1). Therefore, it was suggested, indirect evidence of a deceased husband or wife to the effect mentioned in subsection (1) could not be admissible because he or she would not have been compellable to give direct evidence to the like effect. But in my view competence, not compellability, is the test. The question here is not whether a living spouse can be compelled to give evidence but whether a statement in fact made by a deceased spouse can be received in evidence, and the answer to that question must, in my view, depend on whether he or she could have given direct evidence to the like effect if living, and not on whether he or she could have been compelled to do so. The admissibility of the birth certificates, so far as they are to be regarded as statements by the intestate, follows by parity of reasoning from what I have said above with regard to her oral statements.

Different considerations apply to Rooney's statements. He was not related to the Jenion family but was a mere interloper. It would appear, therefore, that the "pedigree" exception to the general rule as to the exclusion of hearsay evidence does not strictly apply to his case, and, as at present advised, I am not satisfied that the extension of the exception which has been allowed in cases under the Legitimacy Act, 1926, to declarations of deceased putative relations, or allegedly putative relations, of the person seeking a declaration of legitimacy (as to which see *In re Davy* ²⁵ and *Battle v. Attorney-General* ²⁶) is applicable here; though I find it unnecessary to express any concluded opinion on the point for the purpose of deciding the present case. It was suggested in the course of the argument (I think I was myself responsible for the suggestion) that Rooney's statements, in so far as they were admissions of his paternity of the children born at 36 Prospect Street, might be admissible as declarations against

²⁵ [1935] P. 1.²⁶ [1949] P. 358.

interest, as being calculated to involve him in financial liability for their maintenance. But this view does not appear to be tenable having regard to the case in this court of *Lloyd v. Powell Duffryn Steam Coal Co.*,²⁷ and particularly the passage in the judgment of the court delivered by Hamilton L.J. It is true that the actual decision was reversed in the House of Lords,²⁸ but their Lordships appear to have accepted the view that the statements of the deceased putative father were not admissible as declarations against interest, and to have admitted them, not as evidence of their truth, but on the ground that the fact that they were made was evidence of conduct on the part of the putative father which showed him to have believed himself to be the father of the unborn child. In other words, the statements were admitted not as evidence of their truth but as part of the *res gestae*.

Accordingly, in my view, evidence of the terms of any statements made by the intestate is admissible as evidence of the truth of the facts stated by her, though tending to bastardize children born during her marriage; but I propose to proceed on the footing that evidence of the terms of any statements made by Rooney as to his paternity of the children born at 36 Prospect Street is not admissible as evidence of the truth of the facts stated by him. The statements said to have been made by Rooney were, of course, oral statements and, therefore, not within section 1 of the Evidence Act, 1938, which, moreover, by subsection (6) (ii) (b) would, it seems, on a strict application of the rule in pedigree cases, have excluded even a written statement by him concerning the pedigree of the Jenion family.

It was argued that the statements of the intestate and Rooney, even if not admissible as evidence of the truth, were nevertheless admissible in evidence as part of the *res gestae*, and reference was made for this purpose to the *Aylesford Peerage* case,²⁹ to which may be added *Lloyd v. Powell Duffryn Steam Coal Co.*²⁷ The principle underlying this ground of admissibility is thus stated by Lord Selborne in the *Aylesford Peerage* case³⁰: "But I cannot hold that a letter otherwise
"admissible, which is an important act of conduct done by the
"mother, is to be excluded in whole or in part (if it were possible
"to divide one part from the other) because it may contain such
"declarations. These declarations are facts as well as state-
"ments. It is a fact that for some purpose or other the mother

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²⁷ [1913] 2 K.B. 130, 141.²⁸ [1914] A.C. 733.²⁹ 11 App.Cas. 1.³⁰ *Ibid.* 10.

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“ wrote a letter containing such statements at such a time. Your Lordships will not take them as proving the fact; but the fact that the mother did write such a letter, at such a time and for such a purpose, as it appears to me, is a thing which, on the principles which were certainly acted upon in *Morris v. Davies*³¹ (and which appear to me to be sound principles, and quite consistent with the rule), ought not to be excluded from consideration.” If I am right in my view as to the admissibility of the intestate’s statements as evidence of their truth, this alternative ground of admissibility only requires consideration as regards Rooney’s statements. I confess I am in doubt as to the precise extent and effect of this rule, particularly in its application to a mere statement of fact regarding the paternity of a child made many years after the event. Before the abrogation of the rule in *Russell v. Russell*,³² evidence that a deceased married woman had said: “ The children born during my marriage were not my husband’s but another man’s ” would not have been admissible to prove the truth of the statement. How, then, could it advance the matter to admit the same evidence not as proof of the truth of the statement but as proof of the fact that, true or false, the woman did make it? To adduce from the fact that it was made that the woman would have been unlikely to make it if it was not true, and, therefore, that it was probably true, would have amounted to nothing less than doing indirectly the very thing the rule forbade, that is, admitting the woman’s statement by a circuitous route as evidence tending to bastardize her children born in wedlock. But short of this, what evidential value could it have? So far as I can see, none, except in the purely negative sense that the statement did not contradict any inference of illegitimacy which might be deducible from the other evidence in the case. Statements evidencing (for example) a course of conduct in relation to the arrangements made for the birth, maintenance and upbringing of the child, or to the treatment accorded to the child in later years, are obviously in a quite different category.

As to Rooney’s statements treated as part of the *res gestae* (if it be right so to treat them) they can, in my view, carry the matter no further than this, that Rooney did not in these statements contradict any inference as to his paternity of the children born at 36 Prospect Street which can properly be drawn from the other evidence in the case, but on the contrary showed that

³¹ 5 Cl. & Fin. 263.³² [1924] A.C. 687.

(rightly or wrongly) he believed himself to be their father, a circumstance which, in my view, can add virtually nothing to the other evidence in the case.

The defendant's evidence as to her early years at 36 Prospect Street was confused, both as to dates and as to the number and ages of the children in existence at any given time, and I am not surprised that the Vice-Chancellor regarded it as unreliable. It is clear, however, that at the time of her earliest recollection her home was 36 Prospect Street, and, although she suggested that some distinction between her and the other children was made (inferentially a distinction between the Jenion child on the one hand and the Rooney children on the other), the Vice-Chancellor's conclusion from her evidence and that of the plaintiff, James William Jenion, was to the effect "that all the "intestate's children from time to time surviving were brought "up at 36 Prospect Street," and "that James Rooney was the "man of the house and was called father by all the children "including the defendant."

The more material points in the defendant's evidence were these:—(i) That she had never in her life seen William Henry Jenion either at 36 Prospect Street or elsewhere. (ii) That when the defendant was about 16 the intestate told her that the intestate and William Henry Jenion had ceased to live together when the defendant "was a baby," and also told her of what was apparently an amorous intrigue between the intestate and Rooney, which seems to have gone on for a while undiscovered by William Henry Jenion, who, however, did ultimately discover it, whereupon he "walked out and never came back again," and Rooney "went and lived with" the intestate. (iii) That at about the same period the intestate told the defendant that the defendant's father lived in London and worked for Liptons as a carter. (iv) That the intestate told her that Rooney was the father of all the children other than the defendant. She could not be certain of the date of this statement, but thought it was probably when she was 21. (v) That on an occasion, apparently about 1926, she had a meeting with Rooney, who was in a state of agitation, because, according to him, he had found a strange man (not the intestate's husband) in bed with the intestate, and in the course of the interview told the defendant that he was not her father but that he was the father of all the other children.

Police Constable Nugent's evidence was to the effect that he was Rooney's second cousin, and that he had known Rooney since he (the witness) was about three years of age; that so long

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as he had known Rooney "he was living in Prospect Street with a Mrs. Jenion"; but that the witness's first personal recollection of visiting 36 Prospect Street and seeing Rooney and Mrs. Jenion there was when he was about 12 years of age (that is, the witness having been born in 1898, about the year 1910); that he never saw any man other than Rooney, who appeared to be on terms of intimacy with Mrs. Jenion; that he had never met William Henry Jenion; and that Rooney used to visit the witness's mother and father, always accompanied by Mrs. Jenion. Police Constable Nugent also deposed to an occasion shortly after his demobilization in 1920 from service in the first world war, when Rooney had told him that he (Rooney) was not the father of the defendant but was the father of all the other children. Police Constable Nugent also said (and this is more important) that (apparently at about the same period) the intestate told him that she was living with Rooney but that her husband's name was Jenion; and (to give what I take to be the combined effect of a number of answers by the witness) that the defendant and a child who died were the only children she had by Jenion, and that Jenion "was down in London," which was what Rooney had also told the witness as to Jenion's whereabouts.

The only passage in Mrs. Barratt's evidence which need be referred to relates to a conversation she said she had with the intestate at some time after moving to Prospect Street in about 1914. According to Mrs. Barratt, Mrs. Jenion said that she was married to a man by the name of Jenion and that he lived with her mother in Stanhope Street in the south end of Liverpool.

On the footing that the intestate's statements are admissible as evidence of the truth of the facts stated, I would have little hesitation in holding the presumption of legitimacy to be rebutted in the case of the plaintiff, James William Jenion, as well as in the cases of the other four plaintiffs, if the defendant's evidence on the points mentioned above could be accepted in its entirety. But the matter is complicated by the decidedly adverse view which (as already mentioned) the Vice-Chancellor formed of the defendant's evidence. As I understand his judgment, he in effect rejected in its entirety as wholly unreliable all her evidence as to statements made to her by her mother, quite apart from the question of the admissibility of such statements if made. The one point on which he seems to have accepted her evidence was the fact that, so far as she knew, she had never seen William Henry Jenion. It follows, in my view, that except on this one

point the whole of the defendant's evidence must be ignored for the purposes of the present appeal.

How does the matter then stand? The whole of the circumstances point to a complete and permanent breach between the intestate and her husband on account of her relations with Rooney, followed by her setting up house with Rooney at 36 Prospect Street in circumstances excluding any reasonable possibility of access to her by the husband, quite apart from the obvious improbability of his desiring or seeking such access so long as her association with Rooney continued. Police Constable Nugent, whose evidence the Vice-Chancellor did accept, first saw the intestate and Rooney at 36 Prospect Street when he was about 12, that is to say, about 1910. The Vice-Chancellor puts it at about 1911, but I see no ground for this. When a reliable witness says "about 1910" I think one can fairly take the date as between late 1909 and early 1911. Thus his evidence does not exclude the possibility that the intestate and Rooney had only just set up house together at No. 36 when he first saw them there, that he first saw them there in the first half of 1911, but after January in that year, and that James William Jenion had therefore been conceived before they had set up house together at No. 36, and consequently before the date as from which the possibility of further access to the intestate by her husband can be considered as for all practical purposes excluded.

Other passages in Police Constable Nugent's evidence seem to suggest that Rooney's association with the intestate as man and wife had been going on for some time before he first visited them at No. 36, but it must be admitted that the matter is so far not placed beyond reasonable doubt. But it seems to me that all reasonable doubt is really resolved by the intestate's statement to Nugent, which, for the reasons above indicated, I hold to be admissible, to the effect that the defendant and one other child who died were her only children by her husband, William Henry Jenion. This statement must be considered in the light of the fact that the child Robina, born in 1908 or 1909, was in existence at the date when it was made. The intestate was thus saying in effect that Robina and all the children born after her were not William Henry Jenion's children but Rooney's. She could only have been mistaken about this as regards Robina on the footing that at the date of the conception of Robina she was carrying on clandestine sexual relations with Rooney while still living with her husband. But to make out the possibility of a mistake on her part as regards the child whose legitimacy is actually now in

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question, namely, the plaintiff, James William Jenion, one would have to assume that the intestate, while still living with her husband, was indulging in clandestine intercourse with Rooney for a period of as long as two or three years down to January, 1911, and that her husband did not discover this, and leave her on the strength of it, until after the conception in January, 1911, of the plaintiff James William Jenion. This hypothesis is, I think, too improbable to merit acceptance. I would add that I think the defendant's evidence to the effect that so far as she knew she had never seen her father, William Henry Jenion, points in the same direction. The defendant was six-and-a-half in January, 1911. The Vice-Chancellor declined "to accept as" in any way reliable her evidence of events at that time." But I should have thought that if her father had in fact been living with her mother until she was as old as six-and-a-half, and had then left, the defendant would in all probability have remembered it.

As already indicated, I do not think Rooney's statements (if admissible not as evidence of their truth but as part of the *res gestae*) can have any effect except in the negative sense that they are not inconsistent with, and indicate, for what little it is worth, a belief on the part of Rooney consistent with the conclusion against the legitimacy of the plaintiff, James William Jenion, to which the other evidence seems, in my view, to lead.

The passage from Mrs. Barratt's evidence to which I have referred, and on which Mr. Salt, for the plaintiff, James William Jenion, placed considerable reliance, cannot, in my view, alter the result. "Lived" in the intestate's statement as reported could equally well mean "lived before she was married to him" or "lived when she first met him" as "lived at the date of her" statement to Mrs. Barratt" and might even mean "used to" live when they were living together." Even if the meaning assumed by Mr. Salt is the right one, inasmuch as William Henry Jenion's leaving his wife was due to his having been ousted by Rooney, I do not think his residence in Liverpool, even with the intestate's mother, as opposed to his residence in London, would appreciably have altered the position as regards possibility of access, with which geographical considerations had in this particular case very little to do.

There remain the birth certificates. The circumstance that the plaintiff James William Jenion's father is named in his birth certificate as "William Henry Jenion," even with the somewhat suggestive description of "dock labourer," would be strongly in

his favour, were it not for the fact that the same names and description were given in the case of John, who, born on June 13, 1913, must have been illegitimate, and reverted to in the case of Moireen, born on July 21, 1926, who also must have been illegitimate. In view of this, however, I cannot regard the plaintiff James William Jenion's birth certificate as assisting one way or the other on the issue of his legitimacy.

For these reasons, I am of opinion that the presumption of the plaintiff James William Jenion's legitimacy is rebutted by evidence establishing the contrary beyond reasonable doubt, and I would accordingly allow this appeal.

MORRIS L.J. : The contest which arose in this administration action concerned the status at birth of six of the children of the intestate. The Vice-Chancellor decided that the appellant and the respondent were legitimate but that the others were not. The others have not appealed, but the defendant, as the appellant, has challenged the correctness of the decision that James William Jenion, the respondent, was legitimate.

No criticism of the general approach of the Vice-Chancellor can be made. He bore fully in mind that the presumption of the legitimacy of a child born during wedlock "is not lightly to be repelled." As Lord Lyndhurst said in *Morris v. Davies*³³: "It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive." The useful citation made by the Vice-Chancellor from the judgment of Luxmoore J. in *In re Bromage*³⁴ served to emphasize the burden to be discharged in proving illegitimacy. As applied to the present case it would not suffice to show that the intestate was having intercourse with or was living with a man other than her husband, but it would have to be demonstrated to the satisfaction of a judge or jury that no sexual intercourse took place between the intestate and her husband at any time when by such intercourse the husband could by the laws of nature be the father of the child in question.

In my judgment the points of chief substance which are raised in this appeal are: (1) Whether the evidence of statements made by the intestate concerning the paternity of her children was admissible in proof of the truth of what was said, and (2) whether, if it was, the decision in the action concerning the

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³³ 5 Cl. & Fin. 163, 265.

³⁴ [1935] Ch. 605.

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respondent should have been different. I regard these as being the points of real importance for the reason that if contentions advanced on behalf of the appellant as to other aspects of the case are held to be valid, I do not consider that they would also be decisive. It was, for example, submitted that the Vice-Chancellor was in error when he said that Mr. Nugent's visits to 36 Prospect Street only went back to the year 1911. Mr. Nugent said that he was 53 years of age at the time of the hearing in October, 1951: he was not asked as to the date of his birth. His recollection was that he was "about 12" when he first saw the intestate and Rooney together in Prospect Street: he thought that it would be "about 1910." Having regard to the vagueness of this particular piece of evidence I do not consider that the case of the appellant is advanced even if it were thought that some possible slight measure of error was established.

Again it was submitted that even if the evidence as to the intestate's statements was not admissible in proof of the truth of what was said, the statements should have been admitted as part of the *res gestae*. In the *Aylesford Peerage* case³⁵ the Committee of Privileges admitted on this basis certain declarations made in letters written by Lady Aylesford. The facts in that case in reference to the letters were very different from any facts in the present case concerning the intestate's statements. Indeed, in the present case any probative value to be derived from the evidence that the intestate said that some of her children were illegitimate is either negligible or is non-existent if what was said is to be disregarded. There is no virtue in knowing the fact that the intestate said that some of her children were illegitimate if no dependence must be placed upon what was said. Evidence of a bald and isolated declaration not linked with evidence of conduct and action gives no guidance to the truth if no heed may be paid to the declaration itself. In the circumstances of this case if, as was technically possible, the judicial mind was entitled to be receptive of evidence of the fact that the intestate said certain things, it was at once obligatory to jettison practically the whole of what was received, unless the evidence could be accepted as tending to prove the truth of what was said.

It becomes necessary to consider the bearing as regards the present case of the change in the law enacted in 1949. Notwithstanding any rule of law the evidence of a husband or wife is now admissible in any proceedings to prove that marital intercourse

³⁵ 11 App.Cas. 1.

did or did not take place between them during any period. Assuming that the statements of the intestate tended towards such proof, were they admissible? The evidence that certain statements were made was given by Mr. Nugent and also by the appellant. I cannot regard the evidence of either of these as being the evidence of the "wife," that is, the intestate in the proceedings. The language of the new provision now re-enacted as section 32 (1) of the Matrimonial Causes Act, 1950, has reference to the testimony of a living spouse. There is further indication that this is so in subsection (2) where it is provided that a spouse is not to be compelled to give such evidence. At the hearing before the Vice-Chancellor neither the husband nor the wife was available to give evidence and neither could give evidence and neither did give evidence. The new enactment did not therefore have operation in regard to a living spouse in the witness box. The matter does not, however, rest there. To the general rule that statements made by those not called as witnesses are inadmissible to prove the truth of the facts stated there are certain well-recognized exceptions. One of these is that statements made by deceased relatives are admissible to prove matters of pedigree provided that they were made ante litem motam. In *Whitelocke v. Baker*,³⁶ Lord Eldon L.C. said: "declarations in the family, description in wills, descriptions upon monuments, descriptions in Bibles and registry books all are admitted upon the principle, that they are the natural effusions of a party who must know the truth; and who speaks upon an occasion when his mind stands in an even position without any temptation to exceed or fall short of the truth."

The statements to be admitted must, however, be statements that the deceased if living could make in the witness-box. Thus in the *Aylesford Peerage* case³⁷ Lord Selborne L.C. said: "In *Atchley v. Sprigg*³⁸ the Vice-Chancellor excluded declarations which I understand to have been made, not in the witness-box, but during her life, by the mother who was deceased, and which were offered, I presume, for the purpose of showing that the child was her child. We know that unless given post litem motam and for a special purpose which might exclude them, the declarations of deceased members of a family (and I am not at all aware that the mother would be excluded) are admissible in evidence for the purpose of proving relationship. Therefore,

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³⁶ (1807) 13 Ves. 511, 514.³⁸ (1864) 33 L.J.Ch. 345.³⁷ 11 App.Cas. 1, 9.

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“ declarations of that kind by the mother would have been admissible on that principle, if not excluded upon the other principle; “ and the Vice-Chancellor held that such declarations could not “ be received for the purpose of proving the legitimacy of the “ child, which was in controversy; not, as I understand, on the “ *lis mota* principle, but on the principle that the mother would “ not for that purpose have been a competent witness herself, if “ living. I accede to that.” Applying the reasoning of that passage to the present case it would appear that as the intestate if she had been living in 1951 could in some appropriate proceedings, for example, in a legitimacy suit, have given evidence that she did not have marital intercourse during a particular period with her husband, the result follows that after her death evidence could be given of her having made a statement to that effect.

As against this point of view two considerations were urged. In the first place it was submitted that as a living spouse was competent but not compellable to give evidence the statement ought not to be heard of a deceased spouse who would in the nature of things not have opportunity to exercise any option as to whether evidence of a statement should be given. In the second place it was submitted that evidence should not be received of a statement made many years ago and at a time when the author of the statement could not have been heard to give evidence to the effect of the statement. The new statutory provision is introduced with the words “ Notwithstanding any rule of law.” It is arguable that the legislature had in contemplation a rule stated in broad terms to the effect that the declarations of a husband or wife should not be admissible to bastardize children born during wedlock using the word “ declarations ” to denote the statements either of a living or of a dead spouse, and that the intention was to carve out of this rule a limited exception that with the sanction of the solemnity of sworn testimony given voluntarily and subject to the scrutiny of cross-examination a living spouse might elect to give evidence of non-intercourse. While I appreciate the force of the view that I have defined, I have come to the conclusion that the better view is that there was no wider rule of law in contemplation than that which previously rendered inadmissible the evidence that the enactment expressly makes admissible.

As to the two contentions which I have summarized above, the first is largely met when it is remembered that, though in a divorce suit neither spouse can be asked any question tending to show that he or she has been guilty of adultery unless he or she

had already given evidence in the same proceedings in disproof of the alleged adultery, yet evidence can be given of some confession made. Applying the reasoning of Lord Selborne quoted above from the speech in the *Aylesford Peerage* case,³⁷ the position is reached that the statement of the intestate is admissible for the reason that the intestate if living would have been a competent witness to give evidence herself of what she stated. The same reasoning is relevant when considering the second of the two contentions. If the intestate had been alive in 1951 she would have been permitted to give evidence to the effect of the statements attributed to her. If this second contention prevailed then by a parity of reasoning there would have to be excluded from the operation of the Evidence Act, 1938, any statements recorded in writing before the passing of the Act.

Since, for the reasons I have indicated, I have come to the conclusion that the evidence of the statements made by the intestate was admissible, it becomes imperative to decide what is the result that should follow. One possible course is that the matter should go back for further hearing. That would be most undesirable and is to be avoided unless inevitable. In my view the matter can be decided without that necessity, and I propose to examine the position on the basis of the Vice-Chancellor's findings with the addition of Mr. Nugent's evidence as to the statements made by the intestate. The Vice-Chancellor inclined to the view that the appellant's evidence as to what her mother (the intestate) had told her was not reliable evidence. For present purposes that evidence must be disregarded. Mr. Nugent's evidence was accepted. He spoke not only in regard to what the intestate had said to him but to what Rooney had said to him. In the nature of things the statements of Rooney cannot be as informative as those of the intestate. Rooney could say that he believed he was the father of certain children. The intestate could say that she knew that her husband was not. We were not, however, invited to receive the evidence of Rooney's statements as evidence of their truth. As we were not so invited it is not necessary to consider the decision in *Battle v. Attorney-General*.³⁹

Our attention was directed to some evidence given by Mrs. Barratt that the intestate said to her that she was married "to a man by the name of Jenion and that he lived with her mother in Stanhope Street in the south end." It was said that the intestate would be likely to visit her mother and might meet her

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³⁷ 11 App.Cas. 1, 9.³⁹ [1949] P. 358.

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husband and that intercourse might have taken place. It was submitted, accordingly, that proof of non-intercourse was not established. The suggestion implicit in this submission seems to be at least improbable. The Vice-Chancellor was satisfied on the evidence that he accepted that for many years before September 20, 1926, there was no access to the body of the intestate by her husband, but he was left in doubt in regard to the date as from which such a state of affairs existed. In the case of the respondent born in October, 1911, he did not find acceptable evidence to rebut the presumption of legitimacy, but in the case of a daughter born in November, 1914, and in the cases of all later born children he did find such evidence. If, however, the evidence given by Mr. Nugent as to what the intestate said is admitted in proof of what was said, then, in my judgment, the position is very different. The statement of the intestate amounts to saying that, in reference to the times when all the various children, other than the appellant and one who died quite young, were conceived, marital intercourse did not take place between her and her husband. When the statement was made a child by name Robina, who was older than the respondent, was alive. In my judgment the Vice-Chancellor would have come to a different conclusion in regard to the respondent if he had felt able to admit the evidence of the statement of the intestate. With its reception the evidence was such as to rebut the presumption of legitimacy.

I consider, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors: *Joseph Norton, Liverpool; G. J. Lynskey & Sons, Liverpool.*

H. C. G.

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[1950 C. 3491.]

Easement—Claim of prescriptive right to store on neighbour's land vehicles awaiting and undergoing repair and vehicles awaiting collection after repair—Whether such right an easement in law.

The plaintiff was the owner of an orchard and an adjoining house. Access to the orchard from the road was had by a strip

of land, which was about 150 feet long, with a width varying from 15 feet at the road entrance to 35 feet in the middle, and then contracting towards the orchard end. The defendant was a wheelwright, whose premises were opposite to the strip of land across the road, owned by the plaintiff.

The plaintiff brought an action against the defendant, claiming to restrain him from placing and leaving vehicles on the strip. The defendant claimed the right to do so, setting up a lost grant (which claim was not persisted in at trial) and a prescriptive right.

The defendant's claim, so far as proved at the trial, was that for 50 years he and his father before him had, with the knowledge of the plaintiff and of her predecessors in title, continuously stored along the strip, except for a space left for access to the orchard, customers' vehicles awaiting and undergoing repair, and awaiting collection after repair:—

Held, that the right exercised and claimed was too extensive to constitute an easement in law, as it amounted practically to a claim to the whole beneficial user of that part of the strip of land over which it had been exercised.

Dyce v. Hay (1852) 1 Macq. 305, and *Att.-Gen. for Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.* [1915] A.C. 599 considered.

Per curiam: An easement may exist for the benefit of a business which is carried on from the dominant tenant; see *Moody v. Steggles* (1879) 12 Ch.D. 261.

ACTION.

The plaintiff, Mrs. Janet Ethel Vivian Copeland, brought an action against the defendant, Robert Reginald Greenhalf, a wheelwright, for an injunction and a mandatory order to restrain him from continuing to exercise certain alleged rights over a strip of her land at Winchcomb in the county of Gloucester. The defendant claimed an easement to deposit vehicles on the strip of land.

The strip was about 150 feet in length, and led from North Street in the village of Winchcomb to an orchard known as Barebones Orchard. The strip varied in width, from 15 feet at the street end to a maximum of 35 feet rather more than half-way to the orchard, and then narrowing to 20 to 25 feet. It formed the normal and practical access to Barebones Orchard.

The plaintiff purchased the orchard and strip in May, 1946, and in 1949 she purchased an adjoining house. The defendant's workshop and dwelling-house were opposite to the strip and in part opposite to the plaintiff's house. At all material times before 1938 the orchard and strip were let to tenants; in 1942 the property was let to the plaintiff, who held it as tenant until she acquired the fee simple in 1946.

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The defendant, by his defence as amended at the hearing, pleaded as follows: “ (6) For a long time namely for 50 years and upwards before this action the defendant and his predecessors in title to the said house and workshop have by virtue of a deed of grant made unto them by the predecessors in title of the plaintiff who were then seised in fee simple of the plaintiff’s said strip for the estate the plaintiff now has (but which deed has since been lost or destroyed by accident) enjoyed the right to place deposit and store and if necessary repair upon the plaintiff’s said strip along the south-east side thereof alongside the wall or fence there and so as not to extend beyond a distance of 8 ft. 6 ins. inwards from such fence or wall or obstruct or interfere with access for all purposes from and to Barebones orchard to and from North Street carts carriages and other wheeled vehicles of wooden or partly wooden construction cartwheels and farm implements at all times for the more convenient use and occupation of the defendant’s said house and workshop. (7) Alternatively the defendant was and is possessed of the said house and workshop and by reason of such possession is and was at all material times entitled as of right to place deposit and store and if necessary repair upon the plaintiff’s said strip along the south-east side thereof alongside the wall or fence there and so as not to extend beyond a distance of 8 ft. 6 ins. inwards from such wall or fence or obstruct or interfere with access from and to Barebones orchard from and to North Street carts carriages and other vehicles of wooden or partly wooden construction cartwheels and other farm implements in the manner and for the purpose aforesaid and the defendant and his predecessors in title to and the several occupiers of the said house and workshop have for the full periods of 20 and 40 years respectively next preceding the commencement of this action enjoyed as of right and without interruption the said right to place deposit and store and repair as aforesaid and the defendant claims the right so to do as a legal right under section 2 of the Prescription Act, 1832, and as appertaining to the defendant’s said dwelling-house and workshop.”

The effect of the defendant’s claim and of the evidence was summarized as follows in the judgment: “ In my judgment, the defendant has proved up to the hilt the practice which he has claimed, except this, that the practice was not limited so as not to extend beyond a distance of 8 ft. 6 ins. from such fence or wall at all. 8 ft. 6 ins. was never used as the criterion. The

" criterion was that there must be a substantial gangway leading
 " from North Street to the orchard so that the tenant or owner or
 " occupier of the orchard should have easy access thereto to pick
 " the fruit in the summer, to take the hay off it, and so forth.
 " I am quite satisfied that that gangway was always left. On
 " one or it may be two occasions the plaintiff found vehicles not
 " properly stacked, but jutting out so as to obstruct the gangway.
 " She complained once, or possibly twice. It is common ground
 " that when she did complain the vehicles were instantly moved
 " so as to give her this means of ingress and egress.

" The practice established, I find, is this, that for 50 years
 " past the defendant and his predecessor, his father, have been
 " in the habit of storing on the south-east side of the strip
 " vehicles awaiting repair to their woodwork, and that they have
 " been stored on any part on the south-east side of the strip pro-
 " vided that an adequate means of access to Barebones orchard
 " is left, such adequate means being a width of something like
 " 10 ft. Subject to that, the defendant and his predecessors
 " have for the last 50 years used the south-east side of the strip
 " for depositing vehicles awaiting repair, for putting vehicles
 " there which have been repaired and were awaiting collection
 " and for repairing them there themselves. The nature of the
 " vehicles placed on the strip has, of course, changed with changing
 " conditions of life. Lorries and other vehicles of that sort are
 " now placed there and repaired, or while awaiting repair. I am
 " fully satisfied that is what the defendant and his father have
 " done for 50 years. The question is whether that can form the
 " subject-matter of a valid easement."

Cozens-Hardy Horne for the plaintiff. The defendant is
 claiming a right wholly unknown to the law as an easement; it
 is quite uncertain in nature and extent. At first the practice was
 to deposit carts, and later a similar right to deposit motor lorries
 is claimed; and the extent of ground over which the right is
 claimed is quite uncertain. A claim which is uncertain cannot be
 controlled by the court, and is not a valid easement: *Hill v.*
Tupper.¹ A right prescribed for must be reasonable and certain:
Chesterfield (Lord) v. Harris.²

The right claimed here is quite unreasonable, and amounts to
 an ouster of the plaintiff from the beneficial enjoyment of her
 land. *Dyce v. Hay* ³ establishes that a right so wide in extent

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¹ (1863) 2 H. & C. 121.² [1908] 2 Ch. 397.³ (1852) 1 Macq. 305.

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During the greater part of the relevant period the strip was on lease to a succession of tenants; the owners could not have granted a right which interfered with their tenants' enjoyment of the land demised, and the tenants could grant no right as against their owner. The servient owner must have knowledge, actual or constructive, of the user on which prescription is based.

[UPJOHN J. There is evidence that the owners visited Winchcomb regularly, and saw what was happening.]

Even so, they could not imagine that a right of the kind now claimed was being set up.

[UPJOHN J. The notice which the servient owner must have is notice of that which is being done, not of the fact that a claim is being made.]

The claim here is for an easement not appurtenant to the defendant's land, but to his business as a wheelwright. An easement cannot be appurtenant to a business: *Simpson v. Godmanchester Corporation* ⁴; *Attorney-General v. Horner*.⁵ It must be appurtenant to land; if claimed as appurtenant to the defendant's business it must be quite vague in its scope, as the defendant now handles motor lorries and combine harvesters and things quite outside the scope of the business of a wheelwright, as understood for many years. Further, if the right was not appurtenant to his land, it could not have passed to him when the land was conveyed to him by his father.

Boraston for the defendant. The right, as exercised by the defendant and his father, and as now claimed, is to deposit objects on the land of the servient owner. That right has the support of authority: see Gale on Easements, 12th ed., at p. 31. *Pye v. Mumford* ⁶ shows that a practice of depositing muck on the land of a neighbour was accepted as an easement recognized by the law.

[UPJOHN J. It is not clear that the present point was taken in that case; it may well have been a matter of local customary right.]

Foster v. Richmond ⁷ is an additional authority, and *Attorney-General for Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*⁸

⁴ [1897] A.C. 696.

⁵ [1913] 2 Ch. 140.

⁶ (1848) 11 Q.B. 666.

⁷ (1910) 9 L.G.R. 65.

⁸ [1915] A.C. 599.

shows that there may be an easement to store trade goods on adjoining land: that is an easement in favour of a business.

The defendant's business as a wheelwright now comprises the manufacture and repair of wooden parts of carts, lorries and farm accessories; there is no definite limitation as to what a wheelwright can do, and the defendant, as long as he continues his trade, claims the right which has been so long exercised.

The defendant's prescriptive right is not defeated by the fact that the property has been for a long time leased to tenants. There has always been a person holding in fee and capable of making a grant, and on the evidence it must be accepted that the freeholders were aware of what was happening. As the tenants over the years took no steps to protect their own interests, they could not be heard to say that the landlord was derogating from his grant in permitting the state of affairs to continue. [*Daniel v. North*⁹ and *Staffordshire and Worcestershire Canal Navigation v. Birmingham Canal Navigations*¹⁰ were referred to.]

The defendant by his pleading relied also on a lost grant, but that does not appear to afford him extra support beyond the prescriptive claim.

Cozens-Hardy Horne in reply. The alleged right is in a very novel form, and the court ought to be cautious in admitting it because if new types of easements may be prescribed for it will provide great difficulties for conveyancers.

In *Foster v. Richmond*¹¹ the issue was about a right of way for a limited purpose, and the right to deposit rubbish was merely incidental. In *Pye v. Mumford*¹² the right to deposit muck was not the subject of a definite decision, and that case must be qualified by *Dyce v. Hay*,¹³ a later decision of the House of Lords.

The defendant's claim is wholly uncertain. There is nothing to show what width of the strip has been occupied, or what vehicles the defendant can place on it, or how long he can keep them there, or whether his customers also can put them there. It is clear that his activities go far beyond those of an ordinary wheelwright, which is an additional factor of uncertainty. There is no such case as this to be found in the authorities, and the claim falls within the sidenote to *Dyce v. Hay*.¹³

In the *Nigerian* case¹⁴ the facts were very different; the claimants had been in exclusive possession of the land in question,

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⁹ (1809) 11 East 372.

¹⁰ (1866) L.R. 1 H.L. 254.

¹¹ 9 L.G.R. 65.

¹² 11 Q.B. 666.

¹³ 1 Macq. 305.

¹⁴ [1915] A.C. 599.

UPJOHN J. and the observations as to rights of storage¹⁵ were pure dicta.

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Boraston. It is submitted that the observations of Fry J. in *Moody v. Steggles*¹⁶ are conclusive on the question whether an easement can be appurtenant to a business.

UPJOHN J., after stating the facts, continued:—The claim of the defendant depends on prescription or, alternatively, on a lost grant. Mr. Boraston, for the defendant, did not press his claim on the lost grant, because he did not consider that it afforded him any extra support beyond the claim under the Prescription Act. I shall, therefore, deal with this as a claim under the Prescription Act, 1832, alone.

Mr. Boraston said that a custom to deposit objects on the land of another, or a practice of depositing objects on the land of another, could form the subject-matter of a valid easement. He referred me to Gale on Easements, 12th ed., p. 31, which sets out a long list of acts done on servient tenements which have been held to be valid easements. He referred me to *Pye v. Mumford*,¹⁷ a decision of the Court of Queen's Bench, where it appeared that it had been decided at assizes by Coleridge J. that a custom or practice of depositing muck from a dominant tenement on to a servient tenement could be the subject-matter of a valid easement, but the reported decision turned on another point.

He also referred me to the case of *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*¹⁸ In that case the respondents were the owners of certain lands in Lagos. Works of reclamation were carried out so that further land adjoining the original land was added thereto; but being the result, as I read the case, of artificial reclamation, the reclaimed lands vested in the Crown and did not accrue to the respondents. The respondents did certain things on the Crown land, such as building walls and jetties and depositing certain casks and other articles. It was found as a fact that they had exclusive possession of the reclaimed land. At the trial at first instance Osborne C.J. held that they occupied the reclaimed lands under an irrevocable licence from the Crown which was to be presumed from their acts and the acquiescence of the Crown in those acts over many years. On appeal, the Full Court decided that that view was

¹⁵ [1915] A.C. 599, 617.

¹⁶ (1879) 12 Ch.D. 261.

¹⁷ 11 Q.B. 666.

¹⁸ [1915] A.C. 599.

wrong and that the respondents had an easement over the reclaimed land. UPJOHN J.

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Before the Judicial Committee the judgment of Osborne C.J. was restored on the simple ground, as I understand it, that there cannot be an easement over land of which the claimant is in exclusive possession; but the question as to what was capable of being an easement was argued and was discussed shortly in a passage which is of great value to me, although it is, of course, obiter¹⁹: "The judgment of the Full Court has affirmed various " easements over reclaimed land (1) in the case of William's land " for the purpose of storing thereon coopers' stores, casks, trade " goods and produce, and (2) and (3) in the case of Johannsen's " and Dunkley's lands easements for jetties. Against these last " the Crown has not insisted at their Lordships' board; but with " regard to the first point it is maintained that such an easement " is unknown to the law. It is also further maintained that in " any view the use to which the land was put by the respondents " and their predecessors in title could not be the foundation of " any easement, as it was not a right assumed to be taken or " asserted over the land of another; the possession founded upon " was possession of the land as owner thereof. Their Lordships " see no reason why upon the first point a right of easement " should be exclusive of the storage claim." I read that sentence as meaning this: There is no reason why there should not be a valid easement for the purpose of storing on the land coopers' stores, casks, trade goods and produce. The passage continues: "The law must adapt itself to the conditions of modern society " and trade, and there is nothing in the purposes for which the " easement is claimed inconsistent in principle with a right of " easement as such. This principle is of general application, " and was so treated in the House of Lords in *Dyce v. Hay* by " Lord St. Leonards L.C., who observed²⁰: 'The category of " 'servitudes and easements must alter and expand with the " 'changes that take place in the circumstances of mankind.'"

Mr. Boraston presses me, very rightly, with that decision, which he says shows that you can have an easement to deposit trade goods upon the land of another, and that he says, in effect, is all that is done here. It is a claim to deposit goods and to enter the land and repair those goods in connexion with the trade as a wheelwright.

Mr. Horne, on the other hand, says that there are two reasons

¹⁹ [1915] A.C. 599, 617.

²⁰ 1 Macq. 305, 312.

UPJOHN J. why this cannot be a valid easement. First, he says that it is uncertain. He says that the court is not in a position to control the exercise of this easement. He relied on *Hill v. Tupper*,²¹ and he referred to the well-known passage in the judgment of Pollock C.B., which says²²: "A new series of incorporeal hereditament cannot be created at the will and pleasure of the owner of property; but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by Act of Parliament. A grantor may bind himself by covenant to allow any right he pleases over his property, but he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for an infringement of such a limited right as that now claimed."

He pressed me, of course, very strongly with the well-known case of *Dyce v. Hay* in the House of Lords,²³ in which the side-note reads as follows: "There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected. *Semble*, that where a claim in the nature of a servitude or easement is incapable of judicial control and restriction it cannot be sustained by prescription. It does not follow that rights sustainable by grant are necessarily sustainable by prescription. The law of Scotland agrees with the law of England in holding that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. Where new inventions come into use they may have the benefit of servitudes and easements, the law accommodating its practical operation to the varying circumstances of mankind."

He relied in particular on this passage in the speech of Lord St. Leonards L.C.²⁴: "I apprehend, my Lords, that the case of *Home v. Young*²⁵ does not touch the question before you; but I entirely agree with the learned judges below that there is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles. Thus, when the art of bleaching came into use, there was nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category of servitudes and easements must alter and expand with the changes that take place in the

²¹ 2 H. & C. 121.

²² Ibid. 127.

²³ 1 Macq. 305.

²⁴ Ibid. 312.

²⁵ 9 Dunl. 286.

“circumstances of mankind. The law of this country, as well
 “as the law of Scotland, frequently moulds its practical operation
 “without doing any violence to its original principles. But the
 “argument to which I am referring can have no application to
 “this case; because I fancy no one supposes that recreation,
 “taking the air and strolling, are to be regarded as any particular
 “novelties; or that if you are tired in a meadow, and lie down to
 “repose yourself, the refreshment thence arising can reasonably
 “be described as an invention.”

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He contended that there is nothing novel in the business of a wheelwright, but that it is an entirely novel suggestion that a wheelwright or anyone else carrying on trade can have such a right as this. He pointed out the great width of the right claimed: vehicles can be left there for an indefinite time, for years, if necessary; they can be left in a vague and undefined part of the strip, leaving an ill-defined gangway, as it has been called, for the owner of the strip to use in getting to his land. He further pointed out that the defendant is really doing much more than an ordinary wheelwright's business; that he is doing repairs to every form of modern type of vehicle, such as motor lorries, and that that also makes the claim really too uncertain to be enforceable.

Mr. Horne's second point is this, that an easement must be for the benefit of the land, and not for a business carried on in connexion with the land. He referred to *Simpson v. Godmanchester Corporation*²⁶ and *Attorney-General v. Horner*²⁷ as showing that the benefit of an easement must be attached to land and not to some business. It is true that certain words of Buckley L.J. do support that view; but it must be remembered in that case, as Hamilton L.J. pointed out, that in fact the right over the servient tenement was not appurtenant either to land or any business carried on on the land; and I think that the judgment of Buckley L.J. must be read in the light of that circumstance.

I think that so far as concerns the point that an easement must be for the benefit of land and not of a business, the matter is concluded for me by the decision of Fry J. in *Moody v. Steggles*,²⁸ in which he said: “The next point taken on behalf of the defendants is this: It is said that the easement in question relates, not to the tenement, but to the business of the occupant

²⁶ [1897] A.C. 696.²⁸ 12 Ch.D. 261, 266.²⁷ [1913] 2 Ch. 140.

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“ of the tenement, and that therefore I cannot tie the easement
“ to the house. It appears to me that that argument is of too
“ refined a nature to prevail, and for this reason, that the house
“ can only be used by an occupant, and that the occupant only
“ uses the house for the business which he pursues, and therefore
“ in some manner (direct or indirect) an easement is more or less
“ connected with the mode in which the occupant of the house
“ uses it.” Then he proceeds to illustrate that by reference to
certain cases. I also have in mind that the Judicial Committee
in the *Nigerian* case²⁹ felt no difficulty in principle in holding
that there might be an easement in connexion with a right to
deposit trade goods.

So far, therefore, as that point is concerned, I decide that it
does not avail the plaintiff; but I must return to the point of
uncertainty.

I think that the right claimed goes wholly outside any normal
idea of an easement, that is, the right of the owner or the
occupier of a dominant tenement over a servient tenement.
This claim (to which no closely related authority has been
referred to me) really amounts to a claim to a joint user of the
land by the defendant. Practically, the defendant is claiming
the whole beneficial user of the strip of land on the south-east
side of the track there; he can leave as many or as few lorries
there as he likes for as long as he likes; he may enter on it by
himself, his servants and agents to do repair work thereon. In
my judgment, that is not a claim which can be established as an
easement. It is virtually a claim to possession of the servient
tenement, if necessary to the exclusion of the owner; or, at any
rate, to a joint user, and no authority has been cited to me
which would justify the conclusion that a right of this wide and
undefined nature can be the proper subject-matter of an ease-
ment. It seems to me that to succeed, this claim must amount
to a successful claim of possession by reason of long adverse
possession. I say nothing, of course, as to the creation of such
rights by deeds or by covenant; I am dealing solely with the
question of a right arising by prescription.

There is one other matter to which I must advert. Mr. Horne's
third point is quite different. He said that you cannot acquire
an easement, assuming it to be capable of being acquired at law,
unless you can show that the owners knew and acquiesced in the
exercise of the right claimed; and he referred me to a summary

²⁹ [1915] A.C. 599.

of the law on the point to be found in Gale on Easements, 12th ed., at p. 221. Briefly, there must be acquiescence.

[His Lordship reviewed the evidence relating to this question, and continued:] In those circumstances, therefore, had I held that the easement was capable of being valid in law, I should have held that the user for 50 years, which was quite clearly proved, was acquiesced in by the owners of this property, because they must have known that it was going on, and took no steps to stop it. However, as in my judgment the right claimed is not known to the law, I must grant an injunction as asked for by the plaintiff.

Order accordingly.

Solicitors: *Rider, Heaton, Meredith & Mills, for H. W. Stephens & Gosling, Winchcomb, Gloucester; Vizard, Oldham, Crowder & Cash, for J. L. E. Smith-Wood, Winchcomb.*

F. R. D.

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In re ROSE. ROSE AND ANOTHER *v.* INLAND
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[1951 R. No. 436.]

Revenue—Estate duty—Voluntary gifts of shares—Transfers executed—Delay in registering transfers—Transferees entitled from date of transfers—Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2)—Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c).

The deceased by transfer dated March 30, 1943, in consideration of natural love and affection, transferred to his wife, the plaintiff in the first action, 10,000 shares in an unlimited company. By a second transfer of the same date, he transferred a further 10,000 shares in the same company to the plaintiffs in the second action as trustees to hold upon the trusts of a settlement of even date. The transfers were in the form required by the company's articles of association. These authorized the directors to decline to register any transfer. At the date of their execution, the transfers were handed with the relative share certificates to the transferees or

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their agent. The transfers were duly stamped on April 12, 1943, and registered in the books of the company on June 30, 1943. The deceased died on February 16, 1947. The Crown claimed estate duty on the shares on the ground that the gift of the shares was not completed before April 10, 1943, the date which the parties agreed was the relevant date before which the gifts must have been completed to avoid duty under the combined effect of section 38 (2) (a) of the Customs and Inland Revenue Act, 1881, section 11 (1) of the Customs and Inland Revenue Act, 1889, and section 2 (1) (c) of the Finance Act, 1894, together with subsequent legislation. Roxburgh J. held that duty was not payable. On appeal:—

Held, (1) that the deceased having done everything in his power by executing the transfers to transfer his legal and beneficial interest in the shares to the transferees, the transferees had become beneficial owners of the shares and between the date of the execution of the transfers and the registration of the transfers the deceased could not have asserted any beneficial title by virtue of his position as registered holder. Having regard to the form and operation of the transfers, the nature of the property transferred and the necessity for registration in order to perfect the legal title, coupled with the discretionary power in the directors to withhold registration, pending registration the deceased was in the position of a trustee of the legal title in the shares for the transferees. (2) That the gifts of the shares were completed on March 30, 1943, and on that date bona fide possession and enjoyment of the shares had been assumed by the transferees to the entire exclusion of the deceased of any benefit to him by contract or otherwise. Accordingly, no estate duty became payable in respect of the shares on the deceased's death.

Milroy v. Lord (1862) 4 De G.F. & J. 264 considered and distinguished.

In Re Rose [1949] Ch. 78 approved.

Decision of Roxburgh J. [1951] W.N. 563 affirmed.

APPEALS from Roxburgh J.¹

Eric Hamilton Rose (hereinafter called "the deceased") was the holder of a large number of shares in an unlimited company known as the Leweston Estates Company. On March 30, 1943, he executed a transfer in the following terms: "I, Eric Hamilton Rose, of Lewston Manor, Sherborne, in the County of Dorset, Esquire, in consideration of the love and affection I have for my wife Rosamond Mary Rose, of Lewston Manor, Sherborne aforesaid (hereinafter called 'the said transferee'), do hereby transfer to the said transferee 10,000 (ten thousand) shares of £1 each, Nos. 3 to 10,002 inclusive, in the undertaking called 'The Leweston Estates Company To HOLD unto the said transferee subject to the several conditions on which I held the same at the time of the execution hereof; and I, the said transferee,

¹ [1951] W.N. 563.

"do hereby agree to accept and take the said shares subject to the conditions aforesaid." The transfer, which was under seal, was also executed both by the deceased and by Mrs. Rosamond Mary Rose, the plaintiff in the first action.

By a further transfer, also dated March 30, 1943, in similar form, the deceased, in consideration of the sum of 10s. transferred to Mrs. Rose and E. T. Read, who was the company's secretary, a further 10,000 ordinary shares in the company. By a settlement also dated March 30, 1943, the transferees under the second transfer were directed to stand possessed of the 10,000 shares upon trust for Mrs. Rose and the deceased's son. The two transfers and the settlement were executed by all parties between March 30, 1943, and April 5, 1943, and thereafter E. T. Read held the certificates of title to one block of shares on behalf of Mrs. Rose for the purpose of registration, and the certificates of title to the other block of shares on behalf of himself and Mrs. Rose as trustees of the settlement for the same purpose. On April 12, 1943, the transfers were stamped ad valorem pursuant to section 74 of the Finance (1909-1910) Act, 1910. The transfers, however, though delivered to the transferees, were not registered by the company until June 30, 1943. The deceased died on February 16, 1947.

The articles of Leweston Estates Company provided by article 9: "The company shall be entitled to treat the person whose name appears upon the register in respect of any share as the absolute owner thereof, and shall not be under any obligation to recognize any trust or equity or equitable claim to or interest in such share, whether or not it shall have express or other notice thereof." By article 28: "The instrument of transfer of any share in the company shall be in writing, and shall be executed both by the transferor and transferee, and duly attested, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof." By article 29: "Shares in the company shall be transferred in the following form, or as near thereto as circumstances will permit." The form which followed was that used by the deceased. By article 33: "The directors may at any time, in their absolute and uncontrolled discretion and without assigning any reason, decline to register any proposed transfer or shares."

On the death of the deceased the Crown claimed estate duty on the shares transferred by the two transfers of March 30, 1943,

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under the combined operation of section 38 (2) (a) of the Customs and Inland Revenue Act, 1881,² section 11 of the Customs and Inland Revenue Act, 1889,³ and section 2 (1) (c) of the Finance Act, 1894.⁴ It was agreed between the parties that the vital date, in view of the subsequent tax legislation, was April 10, 1943, and that the gift must have been completed before that date to avoid liability to duty.

By the first summons Mrs. Rose, as plaintiff, asked whether estate duty became payable under section 2 (1) (c) of the Finance Act, 1894, on the death of the deceased in respect of 10,000 shares transferred to her by the transfer of March 30, 1943. By the second summons the trustees of the settlement of March 30, 1943, as plaintiffs, asked a similar question with regard to the shares the subject of the second transfer.

Roxburgh J. held that estate duty was not payable.⁵

The Crown appealed.

Pennycuik Q.C. and *J. H. Stamp* for the Inland Revenue Commissioners. The Crown's contention is that estate duty became payable on the death of the deceased on February 16, 1947, under section 2 (1) (c) of the Finance Act, 1894, in respect of the transfer of 10,000 shares in the Leweston Estates Co. to his wife on March 30, 1943, and in respect of a further transfer

² Customs and Inland Revenue Act, 1881, s. 38: "(2) The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—
"(a) Any property taken . . . under a voluntary disposition, made by any person so dying," [that is before June 1, 1881] "purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made three months before the death of the deceased."

³ Customs and Inland Revenue Act, 1889, s. 11: "(1) Subsection 2 of section 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—The description of property marked (a) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bona fide

"possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

⁴ Finance Act, 1894, s. 2: "(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—(c) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

⁵ [1951] W.N. 563.

of 10,000 shares on the same date to trustees which were settled on the same date for the benefit of his wife and son, on the ground that the gifts of the shares were not completed before April 10, 1943, and that bona fide possession was not taken to the entire exclusion of the deceased before that date. These transfers, though delivered to the transferees before April 10, 1943, together with the share certificates, were not registered by the company until June 30, 1943. It is contended that by virtue of the Customs and Inland Revenue Act, 1881, s. 38 (2), as amended by section 11 (1) of the Customs and Inland Revenue Act, 1889, and subsequent Acts, and in particular Sched. XI to the Finance Act, 1941, that the material date by which the transfers had to be completed was April 10, 1943, and that unless the gifts had been completed before that date the shares must be treated as the property of the deceased for death duty purposes. This view is based on the principle laid down in *Milroy v. Lord*⁶ and re-affirmed in *Richards v. Delbridge*.⁷ Roxburgh J., however, held that *In re Williams*⁸ and *In re Rose*⁹ concluded the case against this principle. [They also referred to *Nanney v. Morgan*.¹⁰]

Considering the terms of the transfers, it is submitted that on their true construction they are transfers of the legal estate conditional on the directors approving the transfers. The transferees take no immediate interest. The real question here is whether these transfers can be construed as operating as declarations of trust of the deceased's interest pending registration of the transfers. It is clear from the decision of *Milroy v. Lord*¹¹ that a document which is not effective as a transfer will not be construed as a declaration of trust. Apart from constructive trusts, whether a trust arises or not depends on intention. An intention to hold these shares as trustee until registration of the transfers cannot be imputed to the deceased. If these transfers are construed as declarations of trust, then every imperfect transfer must be so construed.

A donor or his personal representative cannot be forced to complete an imperfect gift, but the donee is entitled to complete the gift if he can. The position between the execution of a transfer of shares and registration has never been considered. It does not follow that, because a transferor cannot prevent a

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⁶ (1862) 4 De G.F. & J. 264.⁷ (1874) L.R. 18 Eq. 11.⁸ [1917] 1 Ch. 1.⁹ [1949] Ch. 78.¹⁰ (1887) 37 Ch.D. 346.¹¹ 4 De G.F. & J. 264.

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transferee registering the transfer, the transferee is the beneficial owner before registration.

In order to escape duty it must be shown that possession was taken by the transferees to the entire exclusion of the deceased. That condition is not satisfied here.

An alternative view is that no benefit passed to the transferees until registration, other than the right to the document of transfer itself, and that the deceased was entitled to all the advantages resulting from his legal ownership of the shares until the registration of the transfers, and that he could have retained any dividends paid before registration.

J. H. Stamp followed. Whatever be the operation of the transfers before registration, it is clear that they did not carry the right to receive dividends. It is submitted that the transfers passed no rights against the deceased or against the company until they were registered. These were common form transfers and conferred no rights on the transferees other than a right to have the transfers considered by the company for registration. There is no justification for saying that the rights in the shares were in any way split and the legal title remained in the deceased and the beneficial title vested in the transferees. Before registration the legal and beneficial ownership was not severed. The transfers were future and executory in their operation, and not having been registered before the crucial date the Crown is entitled to duty.

Grant Q.C. and *F. N. Bucher* for the plaintiffs. The Crown contends that *Milroy v. Lord*¹¹ is not an authority for the proposition that in the interval between the execution of these transfers and their registration the transferees had no beneficial interest in these shares. In that case, the transferor had not done all he could do to vest the shares in the transferee. In *Richards v. Delbridge*¹² the transferor had not done all he could have done to perfect the gift.

It is submitted that after the execution of these transfers the deceased would have held any dividends paid to him on trust for the transferees. If the Crown's case is right, these transfers should not have been stamped ad valorem but the transfer book of the company should have been so stamped. The authorities show that these transfers were complete because the deceased had done all that he could to complete the gift. There is no authority for the proposition that a gift may remain incomplete

¹¹ 4 De G.F. & J. 264.

¹² L.R. 18 Eq. 11.

when the donor has done all in his power to complete the gift according to its nature. It is submitted that the Crown is not entitled to estate duty.

Pennycuik Q.C. in reply. If the company had declared dividends before these transfers had been registered, they would have been paid to the deceased and the transferees could only have recovered them from him on the ground of contract or trust. There was no contract. To make the transfers operate as declarations of trust is to give them an effect which is not borne out by their terms. The handing over of the indicia of title to property is not enough to complete a gift otherwise incomplete.

EVERSHED M.R. stated the facts and continued:— It is the claim of the Crown in both the present cases that the property, namely, the shares which were the subject of the two transfers were not property comprehended within the language of section 38 (2) (a) of the Customs and Inland Revenue Act, 1881, and of section 11 (1) of the Customs and Inland Revenue Act, 1889, so as to be freed from liability thereunder. The Crown's argument may be put on alternative grounds: (1) That the shares were not taken under a voluntary disposition made by a person purporting to operate as an immediate gift; or, alternatively, if they were, (2) that bona fide possession and enjoyment was not assumed on the date of the transfers by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor. The Crown says that until the transfers were registered in the books of the Leweston Estates Company on June 30, 1943, either there was no effective transfer of the shares to the donee or, alternatively, there was not until that date an entire exclusion of the donor from all benefit in respect of the shares.

By way of illustration, the matter has been put thus for the purposes of the argument: that the result of these transfers was such that if, between their date, March 30, and the date of registration, June 30, the company had declared and paid a dividend in respect of its shares, that dividend must have been paid to the deceased, and could have been retained by him for his own benefit, and, indeed, that the respective donees could have had against him no claim whatever to have the amount of the dividend handed over to her or to them respectively.

That is the problem; and Roxburgh J. decided the question which arose in both cases adversely to the Crown. From those decisions the Crown has appealed. It will be sufficient and convenient for me now to confine myself to one of the appeals,

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and I take the first, which relates to the transfer from the deceased to his wife, Mrs. Rose. A decision on that matter will necessarily involve a similar decision on the other.

[His Lordship read the transfer and continued:] There are certain observations which may be made upon that document. The first is this: It was in form in exact correspondence with the requirements of the company's regulations; for in article 29, dealing with the transfer of shares, it is provided that: "Shares " in the company shall be transferred in the following form, or as " near thereto as circumstances will permit." The form which followed was that which the deceased adopted. On its execution the deed of transfer was, beyond question, delivered to the transferee, together with the certificate relative to those shares. It follows, therefore, that so far as lay in his power, the deceased did all that he could—he followed carefully and precisely the obligations imposed on a proposing transferor by the article—to divest himself then and there in favour of his wife of all his interest, legal and equitable, in the 10,000 shares.

The next thing to notice (and it is, I think, not without significance) is this: The company was unlimited, and this form of transfer differed, therefore, in one respect from the forms of transfer sometimes found in the case of limited companies, in that it contained what was, in effect (because it was under seal) a covenant by Mrs. Rose to accept and take the shares subject to the conditions—that is, the conditions imposed on shareholders by the regulations of the company—and it was executed not only by the transferor but also by the transferee.

There is a third matter to which I think some relevance also attaches in considering the validity of the Crown's claim. On April 12, 1943, the transfer was presented for adjudication to the stamping authority, and it bears on it an ad valorem stamp. The impressing of that stamp is justified by section 74 of the Finance (1909–1910) Act, 1910, on the ground that "Any conveyance or " transfer operating as a voluntary disposition inter vivos shall be " chargeable with the like stamp duty as if it were a conveyance " or transfer on sale " subject as thereafter provided.

Approaching the matter then as one of common sense, or one from which the application of common sense is not excluded, and having regard to the terms of the transfer, I should have thought it was exceedingly difficult to contend successfully that on the date of the transfer, March 30, 1943, the deceased did not, within the terms of section 38 (2) (a) of the Act of 1881, make, and Mrs. Rose did not take under, a voluntary disposition purporting to

operate as an immediate gift. That is not conclusive, for there still remains, on any view, the question whether, during the period up to June 30, 1943, the transferor did not, by virtue of the peculiar characteristics attaching to shares in companies, and particularly in this company, retain an interest which interest did not cease until June 30, a date too late for the plaintiffs.

The burden of the case presented by the Crown may be briefly put as it was formulated in reply by Mr. Pennycuick. This document, he said, on the face of it, was intended to operate and operated, if it operated at all, as a transfer. If for any reason it was at its date incapable of so operating, it is not legitimate, either by reference to the expressed intention in the document or on well-established principles of law, to extract from it a wholly different transaction—that is, to make it take effect not as a transfer but as a declaration of trust. Now I agree that on the face of the document it was obviously intended (if you take the words used) to operate and operated immediately as a transfer—“ I do hereby transfer to the transferee ” these shares “ to hold unto the said transferee, subject to the several conditions on which I held the same at the time of the execution hereof.” It plainly was intended to operate immediately as a transfer of rights. To some extent at least, it is said, it could not possibly do so. To revert to the illustration which has throughout been taken, if the company had declared a dividend during this interregnum, it is not open to question that the company must have paid that dividend to the deceased. So that vis-à-vis the company, this document did not, and could not, operate to transfer to Mrs. Rose the right against the company to claim and receive that dividend. Shares, Mr. Pennycuick says, are property of a peculiar character consisting, as it is sometimes put, of a bundle of rights—that is, rights against or in the company. It has followed from his argument that if such a dividend had been paid, the deceased could, consistently with the document to which he has set his hand and seal, have retained that dividend, and, if he had handed it over to his wife, it would have been an independent gift. I think myself that such a conclusion is startling. Indeed, I venture to doubt whether to anybody but a lawyer such a conclusion would even be comprehensible—at least without a considerable amount of explanation. That again is not conclusive; but I confess that I approach a matter of this kind with a pre-conceived notion that a conclusion that offends common sense, so much as this would prima facie do, ought not to be the right conclusion.

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Jenkins L.J. carried the illustration a stage further. He said: Suppose, on the Crown's view, the deceased, retaining, pending registration, full rights over these shares (for Mr. Pennycuick argued that this document not only did not transfer the legal estate but that it transferred no interest or estate whatever), repented of his generosity and told the company not to register the transfer. Supposing Mrs. Rose went to the company and the directors of the company had nevertheless said that they were willing to register the transfer. Let it be then further supposed that the deceased proceeded to take action to restrain the company by injunction from registering the transfer. If the deceased in truth retained at that time a proprietary interest, the court would be bound to protect it by granting an injunction. That, indeed, was perhaps too startling for Mr. Pennycuick, for he said that he thought the court would not grant an injunction and that, the document having at least operated as a gift of a piece of paper, namely, the share certificate, the deceased could not be heard to claim the court's assistance so as to restrain the company from doing that which possession, as upon gift, of the certificate and of this transfer, enabled the donee to require the company to do.

I do not pursue these examples; but it seems to follow from testing this matter by such extreme cases, that the assertion that nothing whatever passed under this deed except the right to possess, as articles, as physical things, two pieces of paper, is not right. I will now go to the case of *Milroy v. Lord*,¹³ which is in truth the foundation of the Crown's argument; since it is on that case that depends the proposition that, if this document was intended to operate as a transfer, effect cannot be given to what may be thought to have been the intention behind it by treating it as operating as a declaration of trust. It is necessary to examine the case with a little care because, being a decision of this court, it is binding on us. It was a case in which a Mr. Medley was the proprietor of a number of shares in a company known as the Bank of Louisiana. The regulations of that bank provided that shares could only be transferred in the books of the bank by following particular formalities which the regulations specified. Mr. Medley, out of love and affection which he expressed to have for his niece, proceeded to execute a deed poll, by which he conveyed, transferred, set over and delivered to Samuel Lord 50 shares in the bank, which were

¹³ 4 De G.F. & J. 264.

specified, such shares to be held by Lord as trustee upon the trusts therein set out. The deed poll was executed under the hand and seal of Medley and of Lord. That deed poll was not a form of transfer which was apt to procure a transfer of shares in the books of the bank according to its regulations. That difficulty, in actual fact, was not necessarily of any significance, because at the same time, Medley had given a power of attorney to Lord authorizing him to do what was necessary, by following the regulations of the company, to transfer these shares to himself. Lord did not avail himself of the power of attorney and nothing was done until Medley died; and then the question arose, to whom did these shares properly belong? The plaintiff, Mrs. Milroy, claimed to be entitled, as beneficiary under the deed, to the shares to the exclusion of Medley's estate. The Court of Appeal rejected that view. It is plain that the basis on which they so decided was that this purported gift was incomplete or imperfect in this sense, that the donor had not done all that lay in his power to do in accordance with the terms on which the shares were held by him to make his gift effective and to divest himself of his beneficial and other interests in the shares. It is pointed out, for example, by Knight Bruce L.J., that ¹⁴ "He might, however, have affected the legal title. It was in his power to make a transfer of the shares so as to confer the legal proprietorship on another person or other persons. But, as I have said, no such thing was done." Turner L.J. emphasized the point when he says ¹⁵ that the shares were never vested in Lord, "and the only ground on which he can be held to have become a trustee of them is, that he held a power of attorney under which he might have transferred them into his own name; but he held that power of attorney as the agent of the settlor." Then he observes that, the settlor having died, the power ceased with him.

Mr. Pennycuik has mostly founded his argument on the passage in the judgment of Turner L.J. where he said ¹⁶: "I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends

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¹⁴ 4 De G.F. & J. 264, 272.¹⁶ Ibid. 274.¹⁵ Ibid. 276.

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“ to provide, and the provision will then be effectual, and it will
 “ be equally effectual if he transfers the property to a trustee
 “ for the purposes of the settlement, or declares that he himself
 “ holds it in trust for those purposes; and if the property be
 “ personal, the trust may, as I apprehend, be declared either in
 “ writing or by parol; but, in order to render the settlement
 “ binding, one or other of these modes must, as I understand the
 “ law of this court, be resorted to, for there is no equity in this
 “ court to perfect an imperfect gift. The cases I think go further
 “ to this extent, that if the settlement is intended to be
 “ effectuated by one of the modes to which I have referred, the
 “ court will not give effect to it by applying another of those
 “ modes. If it is intended to take effect by transfer, the court
 “ will not hold the intended transfer to operate as a declaration
 “ of trust, for then every imperfect instrument would be made
 “ effectual by being converted into a perfect trust.”

Those last few sentences form the gist of the Crown's argument and on it is founded the broad, general proposition that if a document is expressed as, and on the face of it intended to operate as, a transfer, it cannot in any respect take effect by way of trust—so far I understand the argument to go. In my judgment, that statement is too broad and involves too great a simplification of the problem; and is not warranted by authority. I agree that if a man purporting to transfer property executes documents which are not apt to effect that purpose, the court cannot then extract from those documents some quite different transaction and say that they were intended merely to operate as a declaration of trust, which *ex facie* they were not; but if a document is apt and proper to transfer the property— is in truth the appropriate way in which the property must be transferred— then it does not seem to me to follow from the statement of Turner L.J. that, as a result, either during some limited period or otherwise, a trust may not arise, for the purpose of giving effect to the transfer. The simplest case will, perhaps, provide an illustration. If a man executes a document transferring all his equitable interest, say, in shares, that document, operating, and intended to operate, as a transfer, will give rise to and take effect as a trust; for the assignor will then be a trustee of the legal estate in the shares for the person in whose favour he has made an assignment of his beneficial interest. And, for my part, I do not think that the case of *Milroy v. Lord*¹⁷ is an authority

¹⁷ 4 De G.F. & J. 264.

which compels this court to hold that in this case—where, in the terms of Turner L.J.'s judgment, the settlor did everything which, according to the nature of the property comprised in the settlement, was necessary to be done by him in order to transfer the property—the result necessarily negatives the conclusion that, pending registration, the settlor was a trustee of the legal interest for the transferee.

The view of the limitations of *Milroy v. Lord*,¹⁹ which I have tried to express, was much better expressed by Jenkins J. in the recent case which also bears the same name of *In re Rose*¹⁸ (though that is a coincidence). It is true that the main point, the essential question to be determined, was whether there had been a transfer *eo nomine* of certain shares within the meaning of a will. The testator in that case, Rose, by his will had given a number of shares to one Hook but the gift was subject to this qualification, "if such shares have not been transferred to him previously to my death." The question was, had the shares been transferred to him in these circumstances? He had executed (as had this Mr. Rose) a transfer in appropriate form and handed the transfer and the certificate to Hook; but, at the time of his death, the transfer had not been registered. It was said, therefore, that there had been no transfer; and (following Mr. Pennycuik's argument) there had been no passing to Hook of any interest, legal or beneficial, whatever, by the time the testator died. If that view were right then, of course, Hook would be entitled to the shares under the will. But my brother went a little more closely into the matter, because it was obvious that on one view of it, if it were held that there was a "transfer" within the terms of the will, though the transfer was inoperative in the eye of the law and not capable of being completed after the death, then Mr. Hook suffered the misfortune of getting the shares neither by gift *inter vivos* nor by testamentary benefaction. Therefore, my brother considered the case of *Milroy v. Lord*,¹⁹ and in regard to it he used this language²⁰; "I was referred on "that to the well known case of *Milroy v. Lord*,¹⁹ and also to "the recent case of *In re Fry*.²¹ Those cases, as I understand "them, turn on the fact that the deceased donor had not done all "in his power, according to the nature of the property given, "to vest the legal interest in the property in the donee. In such "circumstances it is, of course, well settled that there is no

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¹⁸ [1949] Ch. 78.¹⁹ 4 De G.F. & J. 264.²⁰ [1949] Ch. 78, 89.²¹ [1946] Ch. 312.

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“ equity to complete the imperfect gift. If any act remained
 “ to be done by the donor to complete the gift at the date of the
 “ donor’s death the court will not compel his personal repre-
 “ sentatives to do that act and the gift remains incomplete and
 “ fails. In *Milroy v. Lord* ²² the imperfection was due to the
 “ fact that the wrong form of transfer was used for the purpose
 “ of transferring certain bank shares. The document was not
 “ the appropriate document to pass any interest in the property
 “ at all.” Then he refers to *In re Fry*, ²³ which is another
 illustration. “ In this case, as I understand it, the testator had
 “ done everything in his power to divest himself of the shares
 “ in question to Mr. Hook. He had executed a transfer. It is
 “ not suggested that the transfer was not in accordance with
 “ the company’s regulations. He had handed that transfer
 “ together with the certificate to Mr. Hook. There was nothing
 “ else the testator could do.” I venture respectfully to adopt
 the whole of the passage I have read which, in my judgment, is
 a correct statement of the law. If that be so, then it seems
 to me that it cannot be asserted on the authority of *Milroy v.*
Lord, ²⁴ and I venture to think it also cannot be asserted as a
 matter of logic and good sense or principle, that because, by the
 regulations of the company, there had to be a gap before Mrs.
 Rose could, as between herself and the company, claim the
 rights which the shares gave her vis-à-vis the company, the
 deceased was not in the meantime a trustee for her of all his
 rights and benefits under the shares. That he intended to pass
 all those rights, as I have said, seems to me too plain for
 argument. I think the matter might be put perhaps in a
 somewhat different fashion, though it reaches the same end.
 Whatever might be the position during the period between the
 execution of this document and the registration of the shares,
 the transfers were on June 30, 1943, registered. After regis-
 tration, the title of Mrs. Rose was beyond doubt complete in
 every respect; and if the deceased had received a dividend
 between execution and registration and Mrs. Rose had claimed
 to have that dividend handed to her, what would have been the
 the deceased’s answer? It could no longer be that the purported
 gift was imperfect; it had been made perfect. I am not
 suggesting that the perfection was retroactive. But what else
 could he say? How could he, in the face of his own statement

²² 4 De G.F. & J. 264.²⁴ 4 De G.F. & J. 264.²³ [1946] Ch. 312.

under seal, deny the proposition that he had, on March 30, 1943, transferred the shares to his wife?—and by the phrase “transfer the shares” surely must be meant transfer to her “the shares” and all my right title and interest thereunder.” Nothing else could sensibly have been meant. Nor can he, I think, make much of the fact that this was a voluntary settlement on his part. Being a case of an unlimited company, as I have said, Mrs. Rose had herself to undertake by covenant to accept the shares subject to their burdens—in other words, to relieve the deceased of his liability as a corporator. I find it unnecessary to pursue the question of consideration, but it is, I think, another feature which would make exceedingly difficult and, sensibly impossible, the assertion on the deceased’s part of any right to retain any such dividend. Nor is the Crown’s argument made any easier by the circumstance that another emanation of the Crown has adjudicated that stamp duty ad valorem under section 74 of the Act of 1910 was payable upon this transfer as a disposition of the subject-matter transferred.

For the reasons I have stated, I do not think that *Milroy v. Lord*²⁴ covers the case and I agree with Roxburgh J. in his conclusion to that effect. I also think that upon principle the statement which Mr. Pennycuick has made the foundation of his argument, if it covers this case, is too widely stated. If, as I have said, the phrase “transfer the shares” is taken to be and to mean a transfer of all rights and interests in them, then I can see nothing contrary to the law in a man saying that so long as, pending registration, the legal estate remains in the donor, he was, by the necessary effect of his own deed, a trustee of that legal estate. Nor do I think that that is an unjustifiable addition to or gloss upon the words used in the transfer. Indeed, for my part, I find that a less difficult matter in the way of interpretation than to say that this was, upon its terms, merely a conditional gift, merely a transfer as a gift to Mrs. Rose of a particular right, namely, the right to get herself registered and thenceforward, but not before, to enjoy the benefits which the donor previously had in these shares. That is nothing like what the deed sets out to do. I have said that I reject the proposition that the distinction between a case such as this and a case such as *Milroy v. Lord*²⁴ is, as Mr. Pennycuick urged, indefensible. I think it is sensible and real; and for these reasons I would dismiss the appeals.

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²⁴ 4 D. & G.F. & J. 264.

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JENKINS L.J. I agree. The combined effect of section 38 (2) (a) of the Customs and Inland Revenue Act, 1881, section 11 (1) of the Customs and Inland Revenue Act, 1889, and section 2 (1) (c) of the Finance Act, 1894, together with subsequent legislation affecting the period of time before the death of a deceased within which transactions inter vivos are to be taxable, is that any disposition made by a deceased person purporting to operate as an immediate gift inter vivos not made at least the prescribed minimum period before the death attracts duty. Furthermore, any gift, whenever made, of which bona fide possession and enjoyment is not assumed forthwith on the gift and thenceforth retained to the entire exclusion of the donor, or of any benefit to him, by contract or otherwise, likewise attracts duty, unless there has been complete exclusion of the donor and of any benefit to him for at least the prescribed minimum period prior to the death.

As the law stood at the date of the death, on February 16, 1947, of the deceased, with whom this case is concerned, the relevant minimum period before the death had in general been increased to five years; but by virtue of certain transitional provisions contained in the Finance Act, 1949, applicable to his case, a transaction of either of the kinds I have mentioned would escape duty, provided that any such gift or disposition made by him was made before April 10, 1943, and provided, further, that as regards any gift or disposition made by him before that date bona fide possession and enjoyment had been assumed by the donee to the entire exclusion of the deceased and any benefit to him, by contract or otherwise, from before the same date, April 10, 1943.

The question in this case, therefore, is whether the transfers of shares, admittedly effected, so far as the deceased was concerned, on March 30, 1943, and therefore before the critical date, were caught by the provisions to which I have referred so as to attract duty. There is no doubt, as my Lord has said, that on March 30, 1943, the deceased did execute, under seal, instruments of transfer purporting in each case to transfer 10,000 shares in the company, the instruments of transfer complying strictly with the clause in the company's articles, which states the manner in which shares are to be transferred. Furthermore, before April 10, 1943, those transfers, and the relative share certificates, were duly delivered to the respective transferees or their agent. So far, all seems plain; but as the property transferred consisted of shares in a company, a further event was

necessary in order to perfect the legal title of the transferees, and that further event was the entry of the names of the transferees in the company's register of members as holders of the shares transferred.

[His Lordship quoted the relevant provisions of the articles of association of the Leweston Estates Co. and continued:] On the deceased executing the transfers and handing them over, together with the relative share certificates, to the transferees or their agent, the matter then stood thus: The deceased had done all in his power to divest himself of and to transfer to the transferees the whole of his right, title and interest, legal and equitable, in the shares in question. He had, moreover, complied strictly with the procedure prescribed by the company's articles. Nevertheless, he had not transferred the full legal title, nor could he do so by the unaided operation of any instrument of his: for under its articles the company was only bound to recognize, and in fact would only recognize, the registered holder of a share, and none other, as the absolute owner of the share. The deceased had thus done all he could, in appropriate form, to transfer the whole of his interest, but so far as the legal title was concerned, it was not in his power himself to effect the actual transfer of that, inasmuch as it could only be conferred on the transferees in its perfect form by registration of the transfers. But he had, in my judgment, transferred to the transferees the right to be placed on the register in his stead as the owners of the shares, subject to the directors' power to refuse registration.

That being the nature of the transactions, two questions arise: First, when was the disposition or gift made; secondly, if it was made before April 10, 1943, did the transferees forthwith (or at least before the last-mentioned date) assume possession or enjoyment under the gift and thenceforth retain the same to the entire exclusion of the deceased, or any benefit to him, by contract or otherwise? As to the first question, with respect to those who have contended otherwise, it seems to me plain enough that this gift or disposition must have been made on the date when the deceased executed instruments of transfer and delivered them, with the certificates, to the transferees. After all, any transaction of gift imports a donor and a donee—a disposition by the donor and receipt of the subject-matter of the disposition by the donee. In this case the only gift or disposition by the deceased, the only act of bounty on his part as regards either parcel of shares, took place before April 10, 1943. This claim for duty could not have been made at all except on the footing that the

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transferees derived their beneficial title to these shares from a disposition or gift made by the deceased. To say that the gift was made on the date subsequent to April 10, 1943, when the company's directors in fact registered the transfers, and was therefore dutiable, seems to me a quite untenable proposition; for the registration of the transfers was an act over the doing or refusing of which the deceased had no relevant control, and was moreover an act the doing of which he could not, consistently with his own deeds, oppose. In my view, the directors of the company, when they registered the transfers, registered them because, by virtue of the transfers, the transferees had become owners of the shares, and as such had become entitled to get in the legal estate by being put on the register in respect of the shares.

The second question—that is to say: Did the disposition or the gift operate to the entire exclusion of the transferor, and so forth—can be expressed alternatively by the question: Was this an incomplete gift which was only completed by the registration? That, I think, is the real basis of the Crown's contention. The Crown claims that this was an incomplete gift, because until the moment of registration of the transfers the company could not be compelled to recognize any other person than the deceased as the holder of the shares, and until that happened the gift was incomplete.

It seems to me that the formulation, in terms of an incomplete gift, of the character and effect of the disposition constituted by the execution of the transfers and delivery of them to the transferees with the certificates involves considerable difficulty. I can understand that in given circumstances a gift might, rightly or wrongly, be claimed to be incomplete because it could be recalled by the donor. If here it could be said that the deceased, had he changed his mind at any moment before registration, could, by the taking of appropriate proceedings, recall the transfers and recover the certificates and restrain the directors of the company from registering the transfers, then I would understand the proposition that the gift was incomplete, inasmuch as the property had never passed irrevocably to the donees. But that argument is disclaimed by the Crown, for reasons which I can well understand. It seems to me impossible to suppose that any such action could have been brought by the deceased in this case with any prospect of success. That contention having been disclaimed, it is said, on the part of the Crown, that nevertheless the gift is incomplete because, although the deceased could not

recall it, he remained the owner of the shares until the transferees were registered in respect of them. That proposition seems to me to disregard entirely the form of the transfers. And, indeed, Mr. Pennycuick, for the Crown, in the end said that the effect of the transfers was no more than some sort of conditional authority or promise that, if the directors of the company chose to register the transfers, then, but not otherwise, the transferees should become the owners of the shares. That is a proposition which I cannot accept, and it seems to me to read into the transfers—which are simple and straightforward documents, apt, as I think, to effect an immediate out-and-out transfer and nothing else—conditions of which the language of the documents themselves contains no trace whatever, for the purpose of bringing these transactions within the charge for duty. Accordingly, I adhere to the view I have already expressed, that these transfers were nothing more nor less than transfers of the whole of the deceased's title, both legal and equitable, in the shares, and all the advantages attached to the shares, as from the date on which he executed and delivered the transfers—subject, of course, as regards the legal title, to the provisions of the articles of association of the company as to registration, and to the directors' discretionary power to refuse registration.

If that was the effect of the transfers, what was the position between the delivery of the transfers and the actual registration of the transferees as the holders of the shares? Mr. Pennycuick has referred us to the well-known case of *Milroy v. Lord*,²⁴ which has been his sheet-anchor. He says that on this authority we must be forced to the conclusion that, pending registration, the transfers had no effect at all, and he arrives at that conclusion in this way: He says that these transfers, while purporting to be transfers of the property in the shares and not declarations of trust, did not transfer the property in the shares, because registration was necessary in order to get in the legal title. He says, further, that being transfers purporting to be transfers of the property in the shares and failing of their effect as such for want of registration, they could, pending registration, have no operation at all because in the case of *Milroy v. Lord* ²⁴ it was held that a defective voluntary disposition purporting to operate as a transfer or assignment of the property in question would not be given effect to in equity as a declaration of trust. I agree with my Lord that the case of *Milroy v. Lord* ²⁴ by no means covers the question with which we have to deal in the

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²⁴ 4 De G.F. & J. 264.

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present case. If the deceased had in truth transferred the whole of his interest in these shares so far as he could transfer the same, including such right as he could pass to his transferee to be placed on the register in respect of the shares, the question arises, what beneficial interest had he then left? The answer can only be, in my view, that he had no beneficial interest left whatever: his only remaining interest consisted in the fact that his name still stood on the register as holder of the shares; but having parted in fact with the whole of his beneficial interest, he could not, in my view, assert any beneficial title by virtue of his position as registered holder. In other words, in my view the effect of these transactions, having regard to the form and the operation of the transfers, the nature of the property transferred, and the necessity for registration in order to perfect the legal title, coupled with the discretionary power on the part of the directors to withhold registration, must be that, pending registration, the deceased was in the position of a trustee of the legal title in the shares for the transferees. Thus in the hypothetical case put by the Crown of a dividend being declared and paid (as it would have been paid in accordance with the company's articles) to the deceased as registered holder, he would have been accountable for that dividend to the transferees, on the ground that by virtue of the transfers as between himself and the transferees the owners of the shares were the transferees, to the exclusion of himself.

In my view, in order to arrive at a right conclusion in this case, it is necessary to keep clear and distinct the position as between transferor and transferee and the position as between transferee and the company. It is, no doubt, true that the rights conferred by shares are all rights against the company, and it is no doubt true that, in the case of a company with ordinary regulations, no person can exercise his rights as a shareholder vis-à-vis the company or be recognized by the company as a member unless and until he is placed on the register of members. But in my view it is a fallacy to adduce from that the conclusion that there can be no complete gift of shares as between transferor and transferee unless and until the transferee is placed on the register. In my view, a transfer under seal in the form appropriate under the company's regulations, coupled with delivery of the transfer and certificate to the transferee, does suffice, as between transferor and transferee, to constitute the transferee the beneficial owner of the shares, and the circumstance that the transferee must do a further act in the form of applying for and

obtaining registration in order to get in and perfect his legal title, having been equipped by the transferor with all that is necessary to enable him to do so, does not prevent the transfer from operating, in accordance with its terms as between the transferor and transferee, and making the transferee the beneficial owner. After all, where duty is concerned, the only relevant type of ownership is beneficial ownership, and the situation of the legal estate does not affect the question.

For these reasons, as well as those given by my Lord, I am of opinion that the learned judge came to a right conclusion in this case, and that the shares comprised in these transfers did not attract duty on the death of the deceased.

MORRIS L.J. I am in agreement with the judgments which my Lords have delivered.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Merrimans; Withers & Co.*

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Mine—Coal mine—Jurisdiction of court to grant right to let down surface—Possible duty of property owners in neighbourhood to submit to risk of damage through subsidence—Mines (Working Facilities and Support) Acts, 1923 & 1925 (13 & 14 Geo. 5, c. 20; 15 & 16 Geo. 5, c. 91), s. 3 (1), (2), (4), (6); s. 4 (1); s. 6 (1), (3), (4), (5)—Mining Industry Act, 1926 (16 & 17 Geo. 5, c. 28), s. 13.

By an order dated December 17, 1943, the court of the Railway and Canal Commission gave to Wolstanton Ld. the right to let down the surface of certain lands in Stoke-on-Trent and Newcastle-under-Lyme by working the coal in the Great Row Seam until March 25, 2000, and certain iron and coal in the Red Mine and Ironstone Seam until July 1, 1944. By this summons the National Coal Board, as successors in title to Wolstanton Ld., applied to the High Court—to which the functions of the Railway and Canal Commission had been transferred by the Railway and Canal Commission (Abolition) Act, 1949—for leave to let down the surface by working the Peacock, Spencroft, Great Row and Cannel Row Seams, estimated to have reserves of many millions of tons of coal. The National Coal Board made the application on the

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footing that they would pay for all damage to surface lands caused by their mining operations in pursuance of any right granted to them. They asked for the right to let down the surface until the year 2000, and had already prepared a plan for working the seams for 20 years from the date of this application. Their view was that the coal in the Peacock, Spencroft and Cannel Row Seams underlying the area in question could mostly be conveniently gotten only from the shafts at Wolstanton Colliery which they operated as the Wolstanton Unit. The face for working the Great Row Seam being $2\frac{1}{2}$ miles from the Unit, the National Coal Board proposed to drive two level roadways or locomotive haulage tunnels from the shafts at the Unit to the region of the face in the south part of the area with level cross-measure tunnels to east and west so as to apply the "horizon" system of mining to the area. These developments, it was estimated, would take four or five years or more and cost about £500,000 and a proposed washing plant was anticipated to cost between £300,000 and £400,000, as a result of all of which works the Wolstanton Unit would, it was hoped, yield 500,000 tons a year.

The court ought so to vary the order of 1943, the National Coal Board contended, as to permit all four seams to be worked by the "long wall" system (which allowed all the coal to be taken and the "goaf" or space resulting from its being taken to be packed with stone and other material so as to minimize subsidence) instead of the "pillar and stall" system, which allowed only part of the coal to be taken. They asked leave to use, at their discretion, the "pillar and stall" system in the Cannel Row Seam and the right to work coal from the substantial pillars which the order of 1943 had provided should be left to protect certain parts of the area, the maintenance of those pillars being, they contended, unnecessary and wasteful in the light of increased knowledge of the effects of subsidence:—

Held, (1) that, one object of nationalization being the enabling of long-term planning which had been impossible under private ownership, the Board should have the right to work and, so far as necessary, let down the surface, for a period of 50 years and in respect of the whole Wolstanton Unit; (2) that, given proper safeguards in the working of superimposed seams, risk of increased and unduly serious subsidence would not be caused if the Board were allowed to work any one or more of the four seams, and that they should be allowed to work any of them; (3) that with regard to superimposed seams, during the first ten years from the order, there should only be a minimum period of three years required before working a seam either above or below a seam which has already been worked; (4) that—having regard to the evidence of the importance of the quality of the "packing" in the workings under the "long wall" system, and to the statement, in a passage relating to the North Staffordshire Coalfield in the Regional Survey Report of 1945 on the coalfields of the Midland Region, that no arbitrary methods of work could or should be laid down in the hope of reducing surface subsidence—the court ought not to impose any

more rigid limitations on the working of the seams by the National Coal Board; (5) that the order to be made on this application would have to provide (i) for the protection of Wolstanton County Grammar School and of Orme Girls' School and also for that of Newcastle-under-Lyme High School which was just outside the area comprised in this application, (ii) for the necessary notice and consultation in the case of present and future schools of Staffordshire County Council and for the Coal Board's contribution to special works, and (iii) in case of disagreement between the experts for the county council and the board, for reference to the decision of an expert, acting as an expert and not as an arbitrator; and that the order would contain the terms agreed with objectors and with the Hospital Board and the Minister of Health.

Semble, property owners who must live or do their business in a mining area may, as being only a section of the community, have to submit, because of the overwhelming national interest in the maintenance of or increase in the output of coal, to the probably serious effect of subsidence on their property, subject to their being compensated for pecuniary loss caused in respect of that property.

APPLICATION.

This was an application by the National Coal Board, as successors in title to Wolstanton Ld., (a) for the right to let down the surface of certain lands in Stoke-on-Trent and Newcastle-under-Lyme, referred to in an order dated December 17, 1943, and made by the court of the Railway and Canal Commission on the application of Wolstanton Ld., by the working of certain seams of coal additional to those described in the order; (b) otherwise to vary the order.

The following statement of the facts is taken in substance from the written judgment of Danckwerts J.

The application was made under the Mines (Working Facilities and Support) Act, 1923, by the National Coal Board (established by the Coal Industry Nationalization Act, 1946). The coal mines underlying the lands in question were known as the Wolstanton Unit and were before nationalization worked by Wolstanton Ld., which company, under the order of 1943, were granted the right, at the date of this application vested in the applicants, to let down the surface of the lands by working the coal in the Great Row Seam, subject to certain limitations and conditions in the order.

The Railway and Canal Commission was abolished by the Railway and Canal Commission (Abolition) Act, 1949, which Act transferred its functions to the High Court. Accordingly, the present application came before Danckwerts J. on an originating summons.

The application related to four seams, namely, Peacock, of

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an estimated thickness of 5 feet, at a depth below the surface of 557 yards, and with estimated reserves exceeding 13 million tons; the Spencroft, for which the corresponding figures were 3 feet 6 inches, 570 yards, and 9 million tons; the Great Row, for which the figures were 6 feet, 615 yards, and 8 million tons; and the Cannel Row, for which the figures were 4 feet, 627 yards, and 9 million tons.

The order of December 17, 1943, conferred the right to let down the surface by working the coal in the Great Row Seam underlying certain portions of the lands hatched in blue on plan No. 3 attached to the order and also the right to let down the surface by working certain ironstone and coal in a seam called the Red Mine Ironstone Seam. The latter right expired on July 1, 1944, but the working of that ironstone seam and also the working in the past of another ironstone seam known as the Red Shag Ironstone Seam were material by reason of the possible effect on the subsidence of the local strata. The period of the right to work the Great Row Seam granted by the said order was until March 25, 2000.

There were certain scattered areas within the lands in which the applicants, as the successors of the Duchy of Lancaster, had the right to let down the surface (independently of the order) by reason of that right having been expressly reserved by the Duchy of Lancaster in deeds of enfranchisement relating to the manor of Newcastle-under-Lyme. In *Newcastle-under-Lyme Corporation v. Wolstanton Ld.*¹ it was held by the Court of Appeal that the corporation had no right of support for their gas pipes and could not recover damages from Wolstanton Ld. For some period it was believed by Wolstanton Ld. that they were not under any liability for subsidence, but it was decided to the contrary by the House of Lords in *Wolstanton Ld. v. Newcastle-under-Lyme Corporation*.² The present application was on the footing that the applicants would undertake to pay for all damage to the surface lands caused by their mining operations in pursuance of any right which might be granted to them.

The jurisdiction invoked by the applicants was conferred by the Mines (Working Facilities and Support) Act, 1923.³ Section

¹ [1947] Ch. 427.

² [1940] A.C. 860.

³ Mines (Working Facilities and Support) Act, 1923, s. 3 (1): "Where any facility, right, or privilege is required in order that minerals may be properly and conveniently worked

" by the person entitled to work the same, and the proper and efficient working of the minerals is unduly hampered by the inability or failure of that person to obtain such right, facility, or privilege (hereinafter referred to as an ancillary right), such

13 of the Mining Industry Act, 1926, contained amendments, the details of which were not material to this application.

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"ancillary right may be conferred in
"the manner and subject to the pro-
"visions hereinafter appearing on the
"person having the right to work the
"minerals who is working or desirous
"of working them either by himself
"or through his lessees."

Subs. (2): "In particular, but with-
"out prejudice to the generality of
"the foregoing provisions, such an-
"cillary rights shall include—(a) a
"right to let down the surface. . . ."

S. 4 (1): "Neither the right to
"work minerals nor an ancillary right
"shall be granted under this Act
"unless it is shown that it is not
"reasonably practicable to obtain the
"right in question by private arrange-
"ment for any of the following
"reasons: (a) that the persons with
"power to grant the right or any of
"them, are numerous or have con-
"flicting interests; (b) that the per-
"sons with power to grant the right,
"or any of them, cannot be ascer-
"tained or cannot be found; (c) that
"the persons from whom the right
"must be obtained, or any of them,
"have not the necessary powers of
"disposition, whether by reason of
"defect in title, legal disability or
"otherwise; (d) that the person with
"power to grant the right unreason-
"ably refuses to grant it or demands
"terms which, having regard to the
"circumstances, are unreasonable."

S. 6 (1): "Where a matter is so
"referred to the Commission, the
"Commission, if satisfied that the
"requirements of this part of this
"Act are complied with in the case
"of the applicant, and that it is ex-
"pedient in the national interest that
"the right applied for should be
"granted to him, may, by order,
"grant the right on such terms and
"subject to such conditions, and for
"such period, as the Commission may
"think fit, and upon such an order
"being made, the right specified in
"the order shall, subject to the pro-
"visions hereinafter contained, vest
"in the applicant."

Subs. (3): "In determining the
"duration of any right to be granted
"the Commission shall have regard to
"the time reasonably necessary to
"enable the minerals to be fully
"worked, and where the applicants'
"interest in any minerals in virtue
"of which he is entitled to make the
"application is an interest as lessee,
"shall have regard to the duration of
"such interest."

Subs. (4): "Where the right applied
"for is a right to let down the sur-
"face, the Commission in determining
"whether the right should be granted
"—(a) shall have regard to the value
"of the minerals required for the
"support of any works or buildings
"or intended works or buildings
"on or below the surface as com-
"pared with the value of the build-
"ings or works, and as to whether
"the support of the buildings or
"works or intended works or build-
"ings is in the national interest more
"important than the working of those
"minerals; or (b) if there are no such
"buildings or works, shall have re-
"gard to the extent to which the use
"of the surface for the purposes for
"which it is used or is intended to be
"used will be prejudicially affected
"by subsidence, and as to whether
"the support of the surface is in the
"national interest more important
"than the working of the minerals
"required for the support thereof."

Subs. (5): "In determining whether
"any right should be granted or the
"conditions upon which any such
"right should be granted the Com-
"mission shall have regard to all the
"circumstances of the case, and in
"particular to the extent to which the
"retention of any minerals is required
"for the protection of any mines or
"other works from flooding, or for
"any other mining purpose, and (so
"far as relevant) to the royalties,
"covenants, and conditions reserved
"by or contained in the applicants'
"existing mining lease or leases (if
"any) or customary in mining leases
"in the district."

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Objections to the application were put in on behalf of a number of objectors, but agreement was reached between the National Coal Board and most of them. There were put in evidence agreements with the following objectors: the Railway Executive, the Diocese of Lichfield, the British Electricity Authority, Johnson Fireclay Co. Ltd., the Staffordshire Potteries Water Board, the Stoke-on-Trent Corporation, Twyfords Ltd., Wengers Ltd., and the West Midlands Gas Board. Fine Spinners & Doublers Ltd. withdrew their objection, and the court was informed that terms had been arranged with the Birmingham Regional Hospital Board and the Minister of Health.

The remaining objectors were Newcastle-under-Lyme Corporation, Staffordshire County Council, the Wolstanton Property Owners' Association, and the Stoke-on-Trent Property Owners' Association. The Staffordshire County Council were interested in respect of the schools which they owned in the area affected by the application or which might be erected by them in the future within that area, and the others of those objectors were the owners of numerous buildings on the surface of parts of the said area, and, therefore, they were all very vitally interested in the question of subsidence from the workings which the applicants desired to carry out.

Sir Andrew Clark K.C., W. J. K. Diplock K.C. and J. C. B. W. Leonard for the applicants.

S. Pascoe Hayward K.C. and Wilfrid M. Hunt for Newcastle-under-Lyme Corporation, Staffordshire County Council, Birmingham Regional Hospital Board, Wolstanton Property Owners' Association, and Stoke-on-Trent Property Owners' Association.

Michael Browne for the City of Stoke-on-Trent.

W. F. Waite for Johnson Fireclay Co. Ltd. and Twyfords Ltd.

R. M. A. C. Talbot for Wengers Ltd.

H. E. Francis for British Electricity Authority.

Harold Marnham for Staffordshire Potteries Water Board.

R. Stewart-Brown for West Midlands Gas Board.

Cur. adv. vult.

February 20. DANCKWERTS J., having stated the facts substantially as set out above:—On behalf of the objectors a point was taken in relation to the Act of 1923 which affects the basis of the whole application, and should be dealt with before I enter

on the merits of the application and the other objections to it. It is contended on behalf of the objectors that the jurisdiction conferred by section 3 of the Act of 1923 is not available unless it can be shown that the applicants are in fact presently hampered by the absence of the facility or right for which they ask, that is to say, unless they can show that their effective working of the coal has already been hampered, and that it is not sufficient for the applicants to show that coal is present in the area which the applicants wish to work and that the working of that coal will be hampered in the future, and still more it is not sufficient to show that coal may or may not be present in commercially workable quantities in the area in question. In support of this contention the objectors refer to the statements in the application and to a large amount of the evidence given before me to the effect summarized in paragraph 7 of the application, as follows: "The applicants' workings in the Great Row Seam have encountered an area which so far as present workings have been proved is one of severe geological disturbance, and in which, owing to the absence of any previous working in the greater part of this area, the position of the faults and the gradients of the strata are unproved. Owing to these factors, to the distance of the working faces from the pit bottom, and to the known presence of severe faulting in other areas of the described lands, workings in the Great Row Seam are likely to become uneconomic at an early date and the difficulties due to the existence of faults and other geological disturbances at present being encountered suggest that the present rate of output cannot be maintained for more than twelve months."

This construction of the Act is putting a very strict and limited construction upon the word "is" in section 3 of the Act. It seems to me that to restrict the meaning so severely would destroy to a large extent the usefulness of the powers conferred upon the court and is contrary to the plain intention of the statute. It would hardly be practicable for a mining concern to operate if it was necessary to prove a breakdown of the existing method of working as a condition of making an application under the Act. Continuous output obviously could not be maintained under such conditions, and planning, at the least, would be hampered unduly. The reference in the section to the person who is working or desirous of working the minerals evidently refers to the future as well as the present. Accordingly I reject the contention of the objectors on the construction of the Act.

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The plan on which the application is based is as follows. It is the contention of the applicants that the coal in the Peacock, the Spencroft, and the Cannel Row Seams underlying this area, containing reserves of coal estimated at 31,000,000 tons, can for the most part only be conveniently gotten from the shafts at Wolstanton Colliery which are now operated by the applicants as a unit known as the Wolstanton Unit. The applicants are asking for the right to let down the surface until the year 2000, and they have prepared a plan of working these seams covering the next 20 years. At present the face for working the Great Row Seam under the existing system of working is some two and a-half miles from the shafts at the Wolstanton Colliery, and much time is consumed by the distance which the men have to cover in order to reach the coal face. The applicants propose to drive two level roadways or locomotive haulage tunnels from the existing shafts at the Wolstanton Colliery to the region of the existing face in the southern part of the area, with level cross-measure tunnels to east and west from these roadways, so as to apply what is known as the horizon system of mining to the area, with suitable transport facilities for the men, or "manriding" as it is called. The development of this system will take four or five years or more and will cost some £500,000. Furthermore, as the additional seams which it is desired to work are "dirty seams," that is to say they contain stone and other substances mixed with the coal, it is proposed to establish on the surface a washing plant which will cost some £300,000 to £400,000. It is easy to see, therefore, why the applicants desire to know the conditions under which they may operate for some considerable period ahead. It is also said that the coal thus to be obtained is high-grade industrial coal, the output of which will enable gas and coking coal from other sources which has had to be diverted to industrial purposes to be used for the purposes more appropriate to that kind of coal. An output from the Wolstanton Unit reaching a figure of 500,000 tons a year is hoped to be achieved by these methods. The evidence was clear that under the present arrangements the output from the unit is falling seriously, but it was contended on behalf of the objectors that sufficient facilities could be provided by permission to work one more seam only. As an interim measure during the hearing, as the output of the mine was falling so seriously, I gave permission for one of the further seams to be worked forthwith.

It is admitted by the applicants that the coal which they desire to work cannot be gotten without risk of letting down the

surface, but it is contended by the applicants that surface damage can be reduced to a minimum by reasonable precautions, and they accept liability to pay for any damage which is caused to surface owners by reason of the applicants' mining operations. The applicants have stressed the point that they are a public corporation charged by statute with the duty of mining the coal of the country in the national interest, and that they are not a private body likely to be influenced unduly by the prospect of gain.

The general principles regarding the granting of such a right as is sought by the applicants are laid down in the Act of 1923. I have to weigh against the national interest, which requires the working of these minerals, the prejudicial effect on the property of surface owners likely to be caused by subsidence. The latter is undoubtedly a serious matter to owners of property who are compelled by their circumstances to live or do their business in a mining area, but it may be that, subject to compensation for the pecuniary loss caused to them in respect of their property, they must, by reason of the overwhelming national interest in having the output of coal maintained or increased, submit, as a section only of the community, to the inconvenience which is thereby caused to them.

Subject to the point taken as to the jurisdiction under the Act, I do not think it was really contended that this application should be wholly refused. Its necessity has, of course, been accepted by the objectors with whom agreements have been made; and, even in the case of the four objectors who remained to oppose the application before me, it was not suggested that I should reject the application completely, if the point of construction to which I have already referred was decided against them. The real contest was as to the extent of the working of minerals which should be permitted, and the restrictions which should be imposed on the applicants for the protection of the surface owners.

It became apparent that a large amount of agreement as to the limitations which ought to be applied existed, and substantially, the outstanding issues to be decided are as follows: (1) Should permission be given to the applicants to work all three of the additional seams or should it be confined to one additional seam only? (2) Should the minimum interval between working superimposed seams during the period of 10 years from the date of the order be fixed at three years or five years (it was agreed that after that period of 10 years the minimum interval

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should be five years)? (3) As to packing (between the wastes) when operating the long wall system of working, should the minimum amount be 50 per cent. or 60 per cent. in the Peacock and Spencroft seams, and should the maximum width of the wastes or roadways between the packing be 10 yards or should some narrower maximum width be required? (4) For the purposes of the special protection of schools belonging to the Staffordshire County Council, should the final decision whether rodding should be applied to existing schools or special foundations be provided for new schools, in case of disagreement between the experts of the county council and the National Coal Board, be referred to an independent expert either in all cases, or in the case of the two important existing schools, or should the final decision in effect in such cases be left to the decision of the National Coal Board?

Before proceeding to consider these questions I should state that the applicants desire that the order of 1943 be varied so as to permit the Great Row Seam, as well as the additional seams, the Peacock, the Spencroft and the Cannel Row Seams, to be worked by the "long wall" system of working, which permits total extraction of the coal, the roof of the goaf (or space from which the coal has been taken) being then supported by packing with stone and other materials, so as to minimize subsidence, in place of the system of "pillar and stall" working, which permits only of a portion of the coal being extracted. The applicants ask that in the case of the Cannel Row Seam they should have the option at their discretion to use the "pillar and stall" system of working. Further, the applicants desire the right to work coal from the substantial pillars which by the order of 1943 were required to be left for the protection of particular portions of the area, which contain reserves estimated to amount to 648,000 tons of coal. The applicants contend that, in view of the further knowledge now available of the effects of subsidence, the maintenance of such pillars is unnecessary and is wasteful. Actually this point presents no real difficulty, since agreement has been reached with the objectors concerned. The Staffordshire County Council, who are concerned with certain schools protected by pillars are content, it seems, if the following requirement is imposed, namely, when workings in any seam are projected within 220 yards of the Wolstanton Grammar School, the proposed Girls' Grammar School, Newcastle High School and Orme Girls' School, such workings shall be so designed as to extract the coal within and without the area as quickly as practicable

so as to reduce as far as possible the risk of damage. The operations of Wolstanton Ld. were, of course, limited to the area in which they had the right to work the coal, but, now that the National Coal Board are in control of all the coal, there is no legal reason why they should confine their workings to any particular boundaries, except so far as nature and the requirements of good mining demand it.

On behalf of the National Coal Board a plan, referred to as "R.B.5," was put in evidence, showing the general intentions of the Coal Board in respect of the areas and seams which they proposed to work within the next 20 years. From this plan it appeared that some years would elapse before it was intended to work certain of the areas and seams, and in the southern portion of the whole area affected by the application, beyond some large faults, though the witnesses who gave evidence on behalf of the Coal Board expressed the view, based on knowledge of the existence of the seams some distance away from this area, that the coal was certainly there in the area, yet the precise situation of the seams and the position of the various faults were still unproved. On behalf of the objectors it was, therefore, contended that the application was premature and the conditions required by the Act of 1923 were not satisfied (a contention with which I have already dealt). But it was also contended on behalf of the objectors that the rights to be given by the order should be limited to the period of 20 years and should be confined to the areas shown coloured on the plan "R.B.5" in respect of which that plan indicated an intention to work within that period of 20 years. It was urged that thus the owners of surface lands would receive protection for a further period and that it would be no hardship to the Coal Board to renew their application in 20 years' time. I am satisfied that these contentions ought not to be allowed to prevail. The scheme of working shown on plan "R.B.5" is merely a general indication of the intentions of the Coal Board and is not a hard and fast programme. It may well be subject to alteration as circumstances require, and it seems to me that, if the Coal Board were to be left in uncertainty whether they would be able to obtain the full rights to work and let down the surface in the area of the Wolstanton Unit in 20 years' time, adequate planning on the scale required in order to organize and operate the unit effectively would be frustrated and the flexibility that circumstances may require would be prevented. One of the objects of the nationalization of the mining industry was, as I understand, to enable long-term planning to be made

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which was not possible under the limitations of private ownership. I am satisfied, therefore, that the applicants should receive the right to work and, so far as necessary, let down the surface, for a period of 50 years and in respect of the whole area of the Wolstanton Unit.

Evidence was given on behalf of the objectors that the output of the Wolstanton pits could be maintained if the applicants' workings were confined to the further working of the Great Row Seam or the working of that seam together with one more seam. It was also suggested that the coal desired to be worked could be reached by workings from some adjacent area outside the Wolstanton Unit area. I did not find this evidence sufficiently convincing, in view of the very strong evidence to the contrary which was given on behalf of the applicants.

It was pointed out that a limitation to one further seam would defeat the Coal Board's plan and might well make the object of the proposed horizon roads unattainable and make that plan uneconomic, having regard to the heavy outlay involved in the making of the horizon roads and the establishment of the proposed washing plant on the surface. As I understood the evidence for the Coal Board, the essential factor was that the system of horizon mining to be installed should be able to take advantage of whichever of the seams proved to be the most convenient from time to time, and that there should be that flexibility which was necessary to meet possible emergencies caused by gas, or fires, or the intrusion of water, or falls of the roof. The evidence was that it would be impossible to guarantee a regular and maintained output if the working was limited to one further seam.

This matter is also involved in the question of the risk of subsidence of the surface, which it was suggested would be much reduced if the applicants were restricted to the working of one seam, particularly in the northern portion of the Wolstanton Unit, where it was suggested there was a "cracked pot area" in which the strata had been severely disturbed by the working of the ironstone seams, and also by the absence of proper precautions against subsidence during the period of private ownership of the mine. After considering all the evidence on these points, I have come to the conclusion that, given proper safeguards in respect of the working of superimposed seams (with which I have still to deal) risk of increased and unduly serious subsidence will not be caused if the applicants are allowed to work any one or more of the four seams. I think that the applicants should be given liberty to work any of the four seams.

The next point is as to the limitation which should be imposed in respect of the working of superimposed seams. It is agreed that after 10 years from the date of the order a minimum period of five years shall be required before working a seam either above or below a seam which has already been worked. The issue is whether during the first 10 years from the date of the order the minimum may be reduced to three years. Evidence was given on behalf of the objectors to show that four years after working of a seam, or even later in some localities, movement of the strata has been observed, and it was pointed out that under the scheme of working shown on the plan "R.B.5" there were very few cases where it was proposed to work superimposed seams within three years, and it was suggested that the applicants would not really be hampered by a substitution of five years. The applicants, on the other hand, contend that they must be given a discretion to work, within three years of the working of a seam, another of the seams above or below in order to guarantee the maintenance of a regular output, and in the evidence called on behalf of the applicants it was stated that all serious movement was normally completed within 18 months or two years of the time of working. I was not convinced by the evidence given on behalf of the objectors, and I have come to the conclusion that the applicants may properly be given liberty to work superimposed seams within three years during the first 10 years from the order.

The next point is as to the requirements as to packing in regard to the workings under the "long wall" system. In the Regional Survey Report on the Coalfields of the Midland Region made in 1945, is a passage relating to the North Staffordshire Coalfield (paragraph 93), the considered view is expressed that the method of working coal and the concomitant packing of the wastes should be determined by considerations of safety and efficiency of mining rather than by attempting to reduce surface subsidence. The report states that experiments with "solid" stowing on a large scale have been undertaken in the North Staffordshire Coalfield and the resulting experience showed without doubt that the cost of such solid stowing is altogether prohibitive. No arbitrary methods of work (it is said) could or should be laid down in the hope of reducing surface subsidence; the many differentiating factors requiring consideration in each mine would preclude the possibility of framing any such regulations. The proposals by the applicants of a minimum of 50 per cent. packing (or stowing) and a maximum width of wastes of 10 yards are not

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necessarily those which would be adopted in all cases. Having regard to the evidence as to the importance of the quality of the packing, and the practical considerations mentioned in the report. I am satisfied that I ought not to impose any more rigid limitations on the working of the seams by the applicants. It is to be noted that the city of Stoke-on-Trent have agreed to these limits, and the requirements of the order will be expressed in the terms stated in the agreement with that corporation.

The remaining issue is as to the manner in which protection should be provided for existing schools or future schools which the Staffordshire County Council should erect within the area. The objectors pointed to the provisions to be made for the protection of hospitals and contended that schools were at least as important as the hospitals. On the other side, it was suggested that hospitals, being usually several stories high, imposed greater weight on the soil, and that, owing to the impossibility of removing patients, the services of the hospitals must not be subject to interruption. Schools, on the other hand (it was said), had holiday periods, during which repairs could be undertaken, and also were capable of construction as lighter one-story erections, which would not be subject to the same risk of damage by subsidence, even without special foundations. As I understand the position, the applicants were prepared to accept liability not only for any actual damage for subsidence but also to pay the cost of any preventive works, such as rodding of existing schools and special foundations of future schools, which the experts of the Coal Board and the county council should agree were necessary to guard against damage by future subsidence. The dispute between the parties was confined to the question whether, in case of disagreement between the experts for the respective parties, the matter should be resolved by reference either to an arbitrator or the decision of an independent expert. The county council contended that the matter could not be left to the final disposition of the Coal Board to accept liability for preventive expenditure or to take a chance on subsidence not causing damage. On behalf of the Coal Board reference was made to the ultimate liability of the Board if damage did in fact occur, and to the status of the Board as a public corporation, which it was alleged was calculated to induce a benevolent sense of responsibility not to be found in private undertakings; and it was strongly contended that it would be an intolerable burden to impose on the Board

the prospect of continual references of disputes with the consequent delay of the Board's operations. I appreciate the unwillingness of the county council to be left to the ultimate decision of even a public corporation with special interests. On the other hand, I think the risk of difference between the experts may have been exaggerated, and the imposition of a general right to require the decision of some independent authority or person is not really practicable and would hamper unduly the development of the Coal Board's plans. I think, however, that it is right to make some such provision in the case of the two large schools which are at present protected by pillars numbered 2 and 3 on the plans, that is, Wolstanton County Grammar School and Orme Girls' School. I am not sure what the position is with regard to Newcastle High School, which appears to be just outside the area of the present application, but I think these same provisions ought to include the Newcastle High School, as it may be affected by the operations within the area. A provision for the order will have to be drafted providing for the necessary notice and consultation in the case of the present or future schools of the county council and the Coal Board's contribution to special works, with an added provision for reference to the decision of an expert (acting as such and not as an arbitrator) in the case of the particular schools to which that special provision is to apply.

The new order to be made will have to provide for these matters and the terms agreed with various objectors, and will omit those of the restrictions or requirements in the Order of 1943 which are now obsolete. The terms agreed with the hospital board and the Minister of Health will also have to be inserted in the order. There will be a general liberty to apply.

The year 2000 has been mentioned as the termination of the right which is to be granted, but March 25, 2002, would be a more convenient date.

[After discussion, it was decided that the practice of the Railway and Canal Commission, in not awarding costs of either applicants or objectors in normal cases, should be followed.]

Application allowed.

Solicitors: *R. S. S. Allen, Legal Adviser, National Coal Board (London), for J. Griffith, Legal Adviser, National Coal Board, West Midlands Division (Dudley); Sharpe, Pritchard & Co., for the Town Clerk, Newcastle-under-Lyme, the Clerk to Staffordshire County Council, and the Solicitor, Birmingham Regional*

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Hospital Board; Gibson & Weldon, for the Town Clerk, Stoke-on-Trent; Wedlake, Letts & Birds, for Kent & Jones, Longton; Cunliffe & Airy, for Knight & Sons, Newcastle-under-Lyme; R. A. Finn, Solicitor, British Electricity Authority; Lewin, Gregory, Torr, Durnford & Co., for E. B. Sharpley, Solicitor. Staffordshire Potteries Water Board; Sherwood & Co., for A. C. Croasdell. Edgbaston.

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In re ASTOR'S SETTLEMENT TRUSTS.

ASTOR *v.* SCHOLFIELD AND OTHERS.

[1951 A. 3324.]

Settlement—Trusts—Not for the benefit of individuals—Numerous non-charitable purposes—Inclusion of uncertain objects—Trusts invalid.

A settlement made in 1945 contained trusts of income to be applied during a "specified period" for a number of non-charitable purposes which included, among other things, the "maintenance . . . of good understanding . . . between nations," "the preservation of the independence and integrity of newspapers," "the control publication . . . financing or management of any newspapers," and "the protection of newspapers . . . from being absorbed or controlled by combines." It was not disputed that these purposes were non-charitable and that they did not infringe the rule against perpetuities:—

Held, that the trusts were invalid, first, because they were not for the benefit of individuals but for a number of non-charitable purposes which no one could enforce, and that for this purpose there was no distinction between a settlement and a will, and secondly, because the trusts included objects which were void for uncertainty.

Dicta of Lord Parker in *Bowman v. Secular Society Ltd.* [1917] A.C. 406 applied.

ADJOURNED SUMMONS.

By a settlement dated February 27, 1945, and made between Viscount Astor of the first part, his second son David Astor of the second part, and Viscount Astor, Mr. Arthur Henry Mann and Mr. Thomas Jones as trustees of the third part, certain trusts and purposes were declared of substantially all the issued shares of "The Observer Limited," which had been transferred to the

trustees of the settlement. The present trustees were Lord Astor and the first four defendants.

Clause 5 of the settlement provided that, subject to the provisions of clauses 6 and 8 (which related to accumulations and the remuneration of the trustees), the trustees should during "the specified period," which was: "the period from the date of the settlement until the first day of January two thousand and forty or the earlier expiration of twenty years after the death of the survivor of the issue actually born before the date of the settlement of Lord Astor's late father The Right Honourable William Waldorf First Viscount Astor and his late Majesty King George V respectively, pay or apply the income of the trust funds for or towards all or any of the objects or purposes mentioned in the third schedule hereto at or for such times in such amounts or proportions and in such manner in all respects as Lord Astor and David Astor or the survivor of them during their or his lifetime shall from time to time in writing direct (in respect of the whole or any part or parts of the specified period) or in default of and subject to any such direction then as the trustees in their own discretion shall from time to time decide and so that any income may in accordance with such direction or decision as aforesaid be paid to any person or persons or corporate body for application under this clause without the trustees being bound to see to the actual application thereof and that Lord Astor and David Astor or the survivor of them may at any time or times by deed release or suspend wholly or partially the foregoing power of direction."

The third schedule reads as follows: "Objects or purposes referred to in clause 5 above (no priority between them is to be inferred from the numbers or order by or in which they are mentioned). 1. The establishment maintenance and improvement of good understanding sympathy and co-operation between nations, especially the nations of the English speaking world and also between different sections of people in any nation or community. 2. The preservation of the independence and integrity of newspapers and the encouragement of the adoption and maintenance by newspapers of fearless educational and constructive policies. 3. The promotion of the freedom independence and integrity of the press in all its activities and of the adoption and maintenance of the highest standards throughout the profession of journalism. 4. The control publication carrying on financing or management of any newspapers periodicals books pamphlets or publications or any businesses

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“ connected therewith or with the publication thereof. 5. The protection of newspapers (particularly country or provincial newspapers as distinct from those of the capital) from being absorbed or controlled by combines or being tied by finance or otherwise to special or limited views or interests inconsistent with the highest integrity or independence. 6. The restoration, encouragement protection and maintenance of the independence of the editors of and writers in newspapers and periodicals and the securing (as far as possible) for the public of full means of ascertaining by whom any newspaper is actually owned or controlled. 7. The establishment assistance or support of any charitable public or benevolent schemes trusts funds associations or bodies for or in connexion with (a) the improvement of newspapers or journalism or (b) the relief or benefit of persons (or the families or dependents of persons) actually or formerly engaged in journalism or in the newspaper business or any branch thereof or (c) any of the objects or purposes mentioned in this schedule.”

Clause 7 of the settlement provided: “ From and after the end of the specified period the trustees shall hold the trust funds and the income thereof in trust absolutely and beneficially for the younger of the two persons who shall at such end be respectively the Warden of All Souls College, Oxford and the Master of Trinity College, Cambridge or if the younger of them shall disclaim this benefit then for the other of them or if either office (of Warden or Master) shall be vacant at such end then for the person who shall hold the other office at such end.”

It was common ground that none of those trusts or purposes offended the rule against perpetuities, that they were not charitable, that no directions had been given by the settlors pursuant to clause 5, and that the beneficiary to take from and after the end of “ the specified period ” could now be ascertained. But Lord Astor and his son had been advised that the trusts of income during “ the specified period ” might be void for uncertainty, and it was pointed out to them that the trust at the end of “ the specified period ” would fail if there was then neither a Warden of All Souls College, Oxford, nor a Master of Trinity College, Cambridge. Accordingly, on August 20, 1951, Lord Astor and his son assigned to the fifth and sixth defendants as trustees any beneficial interest which they might have in the trust funds settled by the settlement of 1945 by way of resulting

trust or otherwise. The trusts of the second settlement were charitable, and the Attorney-General was interested accordingly.

The present summons was taken out by Lord Astor to have determined various questions of construction under the settlement of 1945. The question on which this case is reported was whether the trusts declared in clause 5 were void.

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E. I. Goulding for Lord Astor.

Jennings Q.C. and *E. M. Winterbotham* for the trustees of the second settlement argued that the trusts in the third schedule of the first settlement were invalid. Two questions arise for consideration:—(1) To what extent, if at all, is a trust, not for ascertainable persons or institutions, but for purposes, valid? (2) Are the purposes of this trust, on any view, too uncertain to be enforced as a trust?

As to (1), there is no authority relating to trusts constituted *inter vivos*, all the cases relating to wills. A trust is not valid as a trust unless it can be enforced. For a trust to be enforceable there must be a cestui que trust who can enforce it, and the trust must be such that the court could administer it if necessary. The statement in *Underhill on Trusts*, 10th ed., p. 1, is an accurate definition of a strict trust, see also *Tudor on Charities*, 5th ed., p. 63. It was said in *Morice v. Bishop of Durham*¹ that every trust other than a charitable trust must have a definite object, and there must be someone in whose favour the court can decree performance. A test of the certainty of a trust is whether the court can execute it: see *In re MacDuff*.²

Lord Parker laid down in *Bowman v. Secular Society Ltd.*³ that a "trust to be valid must be for the benefit of individuals," or it must be charitable, in the legal as opposed to the popular sense. Harman J. in *In re Wood*⁴ said that a trust must have a cestui que trust; see also *In re Douglas*.⁵

A few cases of purpose trusts which were not charitable have been upheld as valid. They are exceptional cases and have been decided more out of sentiment to give effect to the particular wishes of a testator than to lay down any general principles. They relate to the upkeep of graves and monuments, or the care of a testator's horses or dogs. In all cases there was someone who could enforce the trusts. [He referred to *In re Hooper*⁶;

¹ (1804) 9 Ves. 399, 405; (1805)

⁴ [1949] Ch. 498, 501.

¹⁰ Ves. 521, 539.

⁵ (1886) 35 Ch.D. 472, 485.

² [1896] 2 Ch. 451, 463.

⁶ [1932] 1 Ch. 38.

³ [1917] A.C. 406, 441.

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*De Themmines v. De Bonneval*⁷; *In re Dean*⁸; *Pettingall v. Pettingall*⁹; *Mitford v. Reynolds*¹⁰; *Pirbright v. Salway*.¹¹]

In *In re Thompson*¹² there was a legacy for a purpose, the furtherance of foxhunting; but this was not strictly a case of trust. Moreover, Clauson J. held there that there was someone who could enforce the purpose of the legacy. *In re Price*¹³ appears to be a case of a non-charitable purpose being upheld, but it was decided on other grounds and this point was not raised. [He also referred to Maitland's *Equity*, p. 52.]

As to the second question, the purposes of this trust are too uncertain to be enforced: see *In re Strakosch*.¹⁴

Denys Buckley for the Attorney-General. If these trusts went wrong there would be no one who could enforce them. No authority has gone so far as to say that such a trust is recognized by the law. Such a trust could continue for 100 years, during which time no one would be capable of suing the trustees for breach of trust; there is no machinery in the law to control it. The exceptional class of case which has been recognized is more in the nature of a power than a trust. In *In re Price*¹⁵ there was a beneficial gift to an existing society.

The various objects in the settlement are not in *pari materia*, and it is not possible to say how the funds are to be apportioned. The schedule contains numerous heads, which overlap. The trusts are framed in such wide language that it is impossible for the court to understand what the settlor had in mind. The court cannot enforce trusts which are so uncertain. The settlor has merely expressed certain aspirations, no one can say what is the integrity of newspapers; it is not known from what the press is to be free. Moreover the phrase "or benevolent" is in itself fatal to these trusts.

Gray Q.C. and *Wilfrid M. Hunt* for the trustees of the first settlement. During the lifetime of the settlors the trusts must be exercised as they direct: that is certain. What constitutes uncertainty varies according to what is the subject matter to which the test has to be applied. There are three separate classes of case: (1) will cases where a trust fails owing to a delegation of testamentary power; (2) gifts which are too uncertain to be charitable; and (3) trusts which are too uncertain to be enforced.

⁷ (1828) 5 Russ. 288.

⁸ (1889) 41 Ch.D. 552.

⁹ (1842) 11 L.J.Ch. 176.

¹⁰ (1848) 16 Sim. 105.

¹¹ [1896] W.N. 86.

¹² [1934] Ch. 342.

¹³ [1943] Ch. 422, 430.

¹⁴ [1949] Ch. 529.

¹⁵ [1943] Ch. 422.

There is no test of what constitutes uncertainty in a deed, and there is no authority that a man cannot by deed dispose of his property so that someone else can deal with it. In the case of a will the law may be much stricter, because a man may not delegate his power to make a will. The question in the other cases has not been whether the gifts were too uncertain to be enforced, but whether they were too uncertain to be charitable.

A trust for purposes can be valid, and where there are a number of different purposes and the trustees have a discretion to apply any one of them, it is sufficient if any one of them can be enforced: see *Mitford v. Reynolds*,¹⁶ which is parallel to this case.

The old authorities do not suggest that a trust for purposes was invalid: see *De Themmines v. De Bonneval*.¹⁷ Lewin on Trusts, 15th ed., p. 100, appears to be in favour of it. [They also referred to Underhill on Trusts, 10th ed., pp. 1, 17.] The definition of a trust in Maitland's Equity, pp. 44-50, also includes a trust for purposes. Such trusts are generally charitable, otherwise under a will it would be difficult not to infringe the perpetuity rule or a void delegation, but they may be non-charitable.

The only authority against the validity of these trusts is *Bowman v. Secular Society Ltd.*,¹⁸ but there Lord Parker was not considering the present type of case, but of the particular case before him, whether the trusts there were charitable, and his remarks should be confined to cases under wills; he made no reference to the cases in which trusts for purposes, like those for horses and dogs and tombs, have been held valid. He could not therefore have intended to lay any general principles and his remarks should not be so construed. [He also referred to *James v. Allen*¹⁹ and *Ellis v. Selby*.²⁰]

Even if some of the objects of the trust be void, all the others are not necessarily so; clauses 3 and 4 could easily be carried out.

There is no reason why where, as here, the trustees are given an absolute discretion, that if some of the purposes can be carried out the court should not enforce them.

With regard to the question as to who can enforce the trusts, if future trustees misapplied the funds resort could be had to criminal proceedings; if it happened within a few years, the settlors themselves could do so. The trusts in *In re Price*²¹ were

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¹⁶ 16 Sim. 105.

¹⁷ 5 Russ. 288.

¹⁸ [1917] A.C. 437, 442.

¹⁹ (1817) 3 Mer. 17.

²⁰ (1836) 1 My. & C. 286.

²¹ [1943] Ch. 422.

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upheld, although there was no one to enforce them. The direction in *In re Thompson* ²² is not unlike the present case.

Hunt followed. There is a difference between a deed and a will; the law has been strict with regard to wills because it does not allow someone else to make a will for a testator. [He referred to *Grimond v. Grimond* ²³ and *Morice v. Bishop of Durham*.²⁴] If a trustee is given a selection among objects, it is open to him to carry it out provided that it is not illegal or beyond the perpetuity period. *Prima facie* persons are entitled to dispose of their property as they wish. *Clauson J.* in *In re Thompson* ²⁵ came to a decision which indicated this.

Cur. adv. vult.

April 2. ROXBURGH J., reading his judgment, said:—The question upon which I am giving this reserved judgment is whether the non-charitable trusts of income during “the specified “period” declared by clause 5 and the third schedule of the settlement of 1945 are void. Mr. Jennings and Mr. Buckley have submitted that they are void on two grounds: (1) that they are not trusts for the benefit of individuals; (2) that they are void for uncertainty.

Lord Parker considered the first of these two questions in his speech in *Bowman v. Secular Society Ltd.*²⁶ and I will cite two important passages. The first is ²⁷: “The question whether a “trust be legal or illegal or be in accordance with or contrary to “the policy of the law, only arises when it has been determined “that a trust has been created, and is then only part of the “larger question whether the trust is enforceable. For, as will “presently appear, trusts may be unenforceable and therefore “void, not only because they are illegal or contrary to the policy “of the law, but for other reasons.” The second is ²⁸: “A trust “to be valid must be for the benefit of individuals, which this “is certainly not, or must be in that class of gifts for the benefit “of the public which the courts in this country recognize as “charitable in the legal as opposed to the popular sense of that “term.”

Commenting on those passages Mr. Gray observed that *Bowman v. Secular Society Ltd.*²⁹ arose out of a will and he asked me to hold that Lord Parker intended them to be confined to cases

²² [1934] Ch. 342.

²³ [1905] A.C. 124, 126.

²⁴ 9 Ves. 399, 405.

²⁵ [1934] Ch. 342.

²⁶ [1917] A.C. 406.

²⁷ *Ibid.* 437.

²⁸ *Ibid.* 441.

²⁹ [1917] A.C. 406.

arising under a will. But they were, I think, intended to be quite general in character. Further, Mr. Gray pointed out that Lord Parker made no mention of the exceptions or apparent exceptions which undoubtedly exist, and from this he asked me to infer that no such general principle can be laid down. The question is whether those cases are to be regarded as exceptional and anomalous or whether they are destructive of the supposed principle. I must later analyse them. But I will first consider whether Lord Parker's propositions can be attacked from a base of principle.

The typical case of a trust is one in which the legal owner of property is constrained by a court of equity so to deal with it as to give effect to the equitable rights of another. These equitable rights have been hammered out in the process of litigation in which a claimant on equitable grounds has successfully asserted rights against a legal owner or other person in control of property. Prima facie, therefore, a trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right, and the nature and extent of that obligation would be worked out in proceedings for enforcement. This is what I understand by Lord Parker's first proposition. At an early stage, however, the courts were confronted with attempts to create trusts for charitable purposes which there was no equitable owner to enforce. Lord Eldon explained in *Attorney-General v. Brown*³⁰ how this difficulty was dealt with: "It is the duty of a court of equity, a main part, originally almost the whole, of its jurisdiction, to administer trusts; to protect not the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From this principle has arisen the practice of administering the trust of a public charity: persons possessed of funds appropriated to such purposes are within the general rule; but no one being entitled by an immediate and peculiar interest to prefer a complaint, who is to compel the performance of their obligations, and to enforce their responsibility? It is the duty of the King, as *parens patriae*, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the Crown for all forensic purposes. On this foundation rests the right of the Attorney-General in such cases to obtain by information the interposition of a court of equity. . . ." But if the purposes are not charitable, great

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³⁰ (1818) 1 Swans. 265, 290.

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difficulties arise both in theory and in practice. In theory, because having regard to the historical origins of equity it is difficult to visualize the growth of equitable obligations which nobody can enforce, and in practice, because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control, or in the case of maladministration reform. Therefore, Lord Parker's second proposition would *prima facie* appear to be well founded. Moreover, it gains no little support from the practical considerations that no officer has ever been constituted to take, in the case of non-charitable purposes, the position held by the Attorney-General in connexion with charitable purposes, and no case has been found in the reports in which the court has ever directly enforced a non-charitable purpose against a trustee. Indeed where, as in the present case, the only beneficiaries are purposes and an at present unascertainable person, it is difficult to see who could initiate such proceedings. If the purposes are valid trusts, the settlors have retained no beneficial interest and could not initiate them. It was suggested that the trustees might proceed *ex parte* to enforce the trusts against themselves. I doubt that, but at any rate nobody could enforce the trusts against them. This point, in my judgment, is of importance, because in most of the cases which are put forward to disprove Lord Parker's propositions the court had indirect means of enforcing the execution of the non-charitable purpose.

These cases I must now consider. First of all, there is a group relating to horses, dogs, graves and monuments, among which I was referred to *Pettingall v. Pettingall*³¹; *Mitford v. Reynolds*³²; *In re Dean*³³; *Pirbright v. Salwey*³⁴; and *In re Hooper*.³⁵

In *Pettingall v. Pettingall*³⁶ a testator made the following bequest by his will: " ' Having a favourite black mare, I hereby " ' bequeath, that at my death, £50 per annum be paid for her " ' keep in some park in England or Wales; her shoes to be taken " ' off, and she never to be ridden or put in harness; and that my " ' executor consider himself in honour bound to fulfil my wish, " ' and see that she will be well provided for, and removable at " ' his will. At her death all payment to cease.' It being " ' admitted that a bequest in favour of an animal was valid, two " ' questions were made: first, as to the form of the decree on this

³¹ 11 L.J.Ch. 176.

³² 16 Sim. 105.

³³ 41 Ch.D. 552.

³⁴ [1896] W.N. 86.

³⁵ [1932] 1 Ch. 38.

³⁶ 11 L.J.Ch. 176, 177.

" point; and secondly, as to the disposition of the surplus not required for the mare. Knight Bruce V.C. said, that so much of the £50 as would be required to keep the mare comfortably, should be applied by the executor, and that he was entitled to the surplus. He must give full information, whenever required, respecting the mare; and if the mare were not properly attended to, any of the parties interested in the residue might apply to the court. The decree on this point ought to be, that £50 a year should be paid to the executor during the life of the mare, or until further order; he undertaking to maintain her comfortably; with liberty for all parties to apply." The points which I wish to make are (1) that it was there admitted that a bequest in favour of an animal was valid, and (2) that there were persons interested in residue who having regard to the decree made would have had no difficulty in getting the terms of the bequest enforced.

*Mitford v. Reynolds*³⁷ related to a sepulchral monument and to horses, and there again there was a remainderman on behalf of charity to see to the enforcement of the directions, and an administration action was on foot.

In *In re Dean*³⁸ a testator devised his freehold estates, subject to and charged with an annuity of £750, and to a term of 50 years granted to his trustees, to the use of the plaintiff for life, with remainders over; and he gave to his trustees his horses, ponies and hounds; and he charged his said freehold estates with the payment to his trustees, for the term of 50 years, if any of the said horses and hounds should so long live, of an annual sum of £750. And he declared that his trustees should apply the said annual sum in the maintenance of the horses and hounds for the time being living, and in maintaining the stables, kennels and buildings inhabited by the said animals in such condition of repair as his trustees might deem fit; and in consideration of the maintenance of his horses, ponies, and hounds being a charge upon his said estate as aforesaid, he gave all his personal estate not otherwise disposed of to the plaintiff absolutely. North J. said³⁹: "Then it is said, that there is no cestui que trust who can enforce the trust, and that the court will not recognize a trust unless it is capable of being enforced by someone. I do not assent to that view. There is not the least doubt that a man may if he pleases, give a legacy to

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³⁷ 16 Sim. 105.

³⁸ 41 Ch.D. 552.

³⁹ Ibid. 556.

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"trustees, upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to say who would be the cestui que trust of the monument. In the same way I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say, for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the court to enforce it. If persons beneficially interested in the estate could do so, then the present plaintiff can do so; but, if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively enforce it." This is the best case in the series from Mr. Gray's point of view, because North J. did undoubtedly uphold the particular directions, whether or not they could be "actively enforced." But putting it at its highest, he merely held that there were certain classes of trusts, of which this was one, in which that objection was not fatal. He did not suggest that it was not generally fatal outside the realms of charity.

In *Pirbright v. Salwey*⁴⁰ a testator, after expressing his wish to be buried in the inclosure in which his child lay in a certain churchyard, bequeathed to the rector and churchwardens of the parish church £800 Consols, the interest and dividends to be derived therefrom to be applied, so long as the law for the time being permitted, in keeping up the inclosure and decorating the same with flowers. It was held that the gift was valid for at least a period of 21 years from the testator's death, and *semble* that it was not charitable.

In *In re Hooper*⁴¹ a testator bequeathed to his executors and trustees money out of the income of which to provide, so far as they legally could do so, for the care and upkeep of certain graves, a vault and certain monuments. Maugham J. said: "This point is one to my mind of doubt, and I should have felt some

⁴⁰ [1896] W.N. 86.

⁴¹ [1932] 1 Ch. 38, 39.

" difficulty in deciding it if it were not for *Pirbright v. Salwey*.⁴² " . . . That was a decision arrived at by Stirling J., after argument by very eminent counsel. The case does not appear to " have attracted much attention in textbooks, but it does not " appear to have been commented upon adversely, and I shall " follow it." In this case, and probably also in *Pirbright v. Salwey*,⁴² there was a residuary legatee to bring before the court any failure to comply with the directions. But I think that Maugham J. regarded them both as exceptions from general principle.

Last in this group is *In re Thompson*.⁴³ I have included it in this group because, although it relates to the furtherance of foxhunting and thus moves away from the subject-matter of the group and much nearer to the present case, it is expressly founded on *Pettingall v. Pettingall*,⁴⁴ and it is indeed a most instructive case. The testator bequeathed a legacy of £1,000 to a friend to be applied by him in such manner as he should think fit towards the promotion and furthering of foxhunting, and devised and bequeathed his residuary estate to Trinity Hall in the University of Cambridge. An originating summons was taken out by the executors to determine whether the legacy was valid or failed for want of a definite object or for uncertainty or on other grounds. When counsel, during the course of the argument, observed,⁴⁵ " True, there is no cestui que trust who can enforce the application of the legacy, but that is immaterial: *In re Dean*.⁴⁶ The " object to which the legacy is to be applied is sufficiently defined " to be enforced," Clauson J. interposed⁴⁷: " The college, as " residuary legatees, seem to have an interest in the legacy, as, " but for the trust for its application, they would be entitled to it. " The procedure adopted by Knight Bruce V.-C. in *Pettingall v. Pettingall*,⁴⁸ cited in Jarman on Wills, 7th ed., vol. 2, p. 877, " might be followed in this case." And in his judgment he said⁴⁹: " In my judgment the object of the gift has been defined " with sufficient clearness and is of a nature to which effect can " be given. The proper way for me to deal with the matter will " be, not to make, as it is asked by the summons, a general " declaration, but following the example of Knight Bruce V.-C. " in *Pettingall v. Pettingall*,⁵⁰ to order that, upon the defendant

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⁴² [1896] W.N. 86.

⁴³ [1934] Ch. 342.

⁴⁴ 11 L.J.Ch. 176.

⁴⁵ [1934] Ch. 343.

⁴⁶ 41 Ch.D. 552.

⁴⁷ [1934] Ch. 343.

⁴⁸ 11 L.J.Ch. 176.

⁴⁹ [1934] Ch. 344.

⁵⁰ 11 L.J.Ch. 176.

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"Mr. Lloyd" [the friend] "giving an undertaking (which I understand he is willing to give) to apply the legacy when received by him towards the object expressed in the testator's will, the plaintiffs do pay to the defendant Mr. Lloyd the legacy of £1,000; and that, in case the legacy should be applied by him otherwise than towards the promotion and furthering of foxhunting, the residuary legatees are to be at liberty to apply." I understand Clauson J. to have held in effect that there was somebody who could enforce the purpose indicated because the college, as residuary legatees, would be entitled to the legacy but for the trust for its application and they could apply to the court to prevent any misapplication or breach of the undertaking given by Mr. Lloyd. I infer from what he said that he would not have upheld the validity of this non-charitable purpose if there had been no residuary legatee, and no possibility of making such an order as was made in *Pettingall v. Pettingall*.⁵⁰

Lastly, I was referred to *In re Price*,⁵¹ where a testatrix by her will gave one-half of her residuary estate to the Anthroposophical Society in Great Britain⁵² "to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder, Dr. Rudolf Steiner." At first sight this case would appear to be a strong card in Mr. Gray's hand. The first part of the judgment proceeds upon the footing that the purposes were not charitable. The society was the residuary legatee and there was no room for such an order as was made in *In re Thompson*.⁵³ There was nobody who could have enforced the carrying out of the purposes. On closer inspection, however, it will be found that this point was not raised in argument or referred to in the judgment, and the decision was based upon *In re Drummond*,⁵⁴ which is a different class of case. As the present case cannot, on any view, be assimilated to *In re Drummond*,⁵⁴ I need not further consider *In re Price*.⁵⁵

Let me then sum up the position so far. On the one side there are Lord Parker's two propositions with which I began. These were not new, but merely re-echoed what Sir William Grant had said as Master of the Rolls in *Morice v. The Bishop of Durham*⁵⁶ as long ago as 1804: "There must be somebody, in whose favour the court can decree performance." The position was recently restated by Harman J. in *In re Wood*⁵⁷:

⁵⁰ 11 L.J.Ch. 178.

⁵¹ [1943] Ch. 422.

⁵² Ibid. 423.

⁵³ [1934] Ch. 342.

⁵⁴ [1914] 2 Ch. 90.

⁵⁵ [1943] Ch. 422.

⁵⁶ 9 Ves. 399, 405.

⁵⁷ [1949] Ch. 498, 501.

"A gift on trust must have a cestui que trust," and this seems to be in accord with principle. On the other side is a group of cases relating to horses and dogs, graves and monuments—matters arising under wills and intimately connected with the deceased—in which the courts have found means of escape from these general propositions and also *In re Thompson*⁵⁸ and *In re Price*⁵⁹ which I have endeavoured to explain. *In re Price*⁵⁹ belongs to another field. The rest may, I think, properly be regarded as anomalous and exceptional and in no way destructive of the proposition which traces descent from or through Sir William Grant through Lord Parker to Harman J. Perhaps the late Sir Arthur Underhill was right in suggesting that they may be concessions to human weakness or sentiment (see *Law of Trusts*, 8th ed., p. 79). They cannot, in my judgment, of themselves (and no other justification has been suggested to me) justify the conclusion that a Court of Equity will recognize as an equitable obligation affecting the income of large funds in the hands of trustees a direction to apply it in furtherance of enumerated non-charitable purposes in a manner which no court or department can control or enforce. I hold that the trusts here in question are void on the first of the grounds submitted by Mr. Jennings and Mr. Buckley.

The second ground upon which the relevant trusts are challenged is uncertainty. If (contrary to my view) an enumeration of purposes outside the realm of charities can take the place of an enumeration of beneficiaries, the purposes must, in my judgment, be stated in phrases which embody definite concepts and the means by which the trustees are to try to attain them must also be prescribed with a sufficient degree of certainty.

The test to be applied is stated by Lord Eldon in *Morice v. Bishop of Durham*⁶⁰ as follows⁶¹: "As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust: a trust therefore, which, in case of mal-administration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can

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⁵⁸ [1934] Ch. 342.

⁵⁹ [1943] Ch. 422.

⁶⁰ 10 Ves. 521.

⁶¹ *Ibid.*, 539.

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"neither reform mal-administration, nor direct a due administration." See also *In re Macduff*.⁶²

Mr. Gray argued that this test was not properly applicable to trusts declared by deed, but I can see no distinction between a will and a deed in this respect.

Applying this test, I find many uncertain phrases in the enumeration of purposes, for example, "different sections of "people in any nation or community" in paragraph 1 of the third schedule, "constructive policies" in paragraph 2, "integrity of the press" in paragraph 3, "combines" in paragraph 5, "the restoration . . . of the independence of . . . "writers in newspapers" in paragraph 6, and "benevolent "schemes" in paragraph 7. Mr. Gray suggested that in view of the unlimited discretion bestowed upon the trustees (subject only to directions from the settlors) the trustees would be justified in excluding from their purview purposes indicated by the settlors but insufficiently defined by them. But I cannot accept this argument. The purposes must be so defined that if the trustees surrendered their discretion, the court could carry out the purposes declared, not a selection of them arrived at by eliminating those which are too uncertain to be carried out. If, for example, I were to eliminate all the purposes except those declared in paragraph 4, but to decree that those declared in paragraph 4 ought to be performed, should I be executing the trusts of this settlement?

But how in any case could I decree in what manner the trusts applicable to income were to be performed? The settlement gives no guidance at all. Mr. Hunt suggested that the trustees might apply to the court *ex parte* for a scheme. It is not, I think, a mere coincidence that no case has been found outside the realm of charity in which the court has yet devised a scheme of ways and means for attaining enumerated trust purposes. If it were to assume this (as I think) novel jurisdiction over public but not charitable trusts it would, I believe, necessarily require the assistance of a custodian of the public interest analogous to the Attorney-General in charity cases, who would not only help to formulate schemes but could be charged with the duty of enforcing them and preventing maladministration. There is no such person. Accordingly, in my judgment, the trusts for the application of income during "the specified period" are also void for uncertainty.

⁶² [1896] 2 Ch. 451, 463.

But while I have reached my decision on two separate grounds, both, I think, have their origin in a single principle, namely, that a court of equity does not recognize as valid a trust which it cannot both enforce and control. This seems to me to be good equity and good sense.

I dealt at the hearing with the trusts for accumulation and the trusts to take effect at the end of "the specified period," and the order will be drawn up accordingly.

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Declarations accordingly.

Solicitors: *Janson, Cobb, Pearson & Co.; The Treasury Solicitor.*

I. G. R. M.

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[1951 M. No. 2627.]

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Town and Country Planning—Development begun before appointed day—Permission to erect buildings granted in 1938—Permission conditional on completion of work within 18 months—No reason given for condition—Validity of condition—Site cleared but rebuilding not begun before July 1, 1948—Whether fresh planning permission required—Meaning of "works"—Town and Country Planning Act, 1932 (22 & 23 Geo. 5, c. 48), s. 10 (3) (5)—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 78 (1).

Evershed M.R.,
Jenkins and
Morris L.JJ.

On June 16, 1938, the plaintiffs applied to the London County Council under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933, for permission to erect certain specified buildings in accordance with the terms of the building agreement under which they held land in Marylebone. Permission was granted by letter dated August 9, 1938, for the erection of the buildings, subject to the condition that the work should be completed within eighteen months, failing which the consent was to become void, and to five further conditions. No reasons were given in the letter for the imposition of these conditions. In June, 1939, the plaintiffs entered into a contract with a firm of contractors for the demolition of the existing buildings on the site. This work was completed by August, 1939, but no contract was entered into before the war for the erection of the new buildings. The plaintiffs never abandoned their intention to erect the buildings but nothing more

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was done until November, 1948, when the plaintiffs notified the London County Council that they were proposing to proceed with the building. The council, purporting to act under the Town and Country Planning Act, 1947, refused to sanction what was described as development of the site. The plaintiffs thereupon applied to the Central Land Board for exemption from the payment of development charge. That application was refused. By this summons the plaintiffs asked whether: (a) for the purposes of section 78 (1) of the Town and Country Planning Act, 1947, they had, before the appointed day, begun but not completed works for the erection of buildings on the site and (b) for the purposes of section 10 (3) of the Town and Country Planning Act, 1932, and the General Interim Development Order of 1933, they, immediately before the appointed day, had obtained a valid permission to complete the works, either in accordance with a consent under the order to the erection of the buildings granted to them by the London County Council on August 9, 1938, or by reason of that consent being deemed to have been granted unconditionally by the council, and whether they could have completed the above works in accordance with that permission.

Harman J. held, first, that "works" for the erection of a building had not been begun before July 1, 1948, the appointed day; and secondly, that immediately before that day the works in question could not have been completed in accordance with the permission granted under the Act of 1932. On appeal:—

Held, (1) (Evershed M.R. dissenting) that the plaintiffs had, within the meaning of section 78 (1) of the Town and Country Planning Act, 1947, begun works for the erection of a building on the site in question before the appointed day but had not completed them. "Works" in section 78 (1) of the Act of 1947 had a wide meaning and referred to the totality of things to be done for the purpose of erecting a building and included works of demolition.

(2) That the London County Council had no power under section 10 (3) of the Town and Country Planning Act, 1932, to impose the condition as to time or the other conditions on which they gave the permission to develop in their letter of August 9, 1938, unless reasons for the imposition of such conditions were given. Accordingly, they must, under section 10 (3), be deemed to have granted permission unconditionally for the erection of the buildings in question. It followed that immediately before the appointed day the plaintiffs could have completed the erection of the buildings in accordance with the planning permission contained in the letter of August 9, 1938, with the result that the requirements of section 78 (1) of the Act of 1947 would have been satisfied and planning permission was by virtue of that sub-section to be deemed to have been granted under Part III of the Act of 1947.

Per curiam: There was nothing in section 10 (3) of the Act of 1932 which cut down the power thereby conferred to impose conditions, and accordingly a planning authority had under that section power to impose conditions as to time.

Decision of Harman J. [1951] W.N. 624, reversed.

APPEAL from Harman J.¹

The plaintiffs, Marks & Spencer Ltd., in 1938 were entitled to the benefit of a building agreement with the Portman Estate. The agreement related to a large site on which were buildings then in occupation fronting on East Street and Paddington Street, Marylebone, and by it the plaintiffs became entitled, on the completion of the buildings to be erected, to a lease for 90 years at a rent rising to £840 a year. The agreement provided for a forfeiture if the intended lessee failed to proceed with or complete the proposed works in accordance with its terms, and the third schedule stipulated that the demolition of the old buildings on the site was to be begun by midsummer, 1938, and that the erection of the new buildings was to be completed by Christmas, 1939. These time limits were extended by agreement from time to time. On June 16, 1938, the plaintiffs applied to the London County Council under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933, for permission to erect the buildings which they had agreed to erect under the building agreement. Permission was granted by letter dated August 9, 1938, in the following terms: "I am directed to inform you that the council, "in pursuance of its powers under the above-named order, hereby "permits the erection of a building at the premises known as " (which were then defined) "in accordance with plans" (which were then specified) "submitted subject to (1) the work being "commenced within six months and completed within 18 months "from August 1, 1938, failing which the consent shall become "null and void." Five more conditions followed. No reasons were given for the imposition of the conditions. The plaintiffs also obtained all consents necessary to their building scheme under the London Building Acts and the Restriction of Ribbon Development Act, 1935.

Tenders for the erection of the new building were sought from a number of contractors but none of them was accepted. No further steps were taken until March, 1939, when, at the instance of the Portman Estate, the plaintiffs decided to proceed with the demolition of the old buildings, and on June 9, 1939, they entered into a contract with a firm of demolition contractors under which the contractors had to complete the work of demolition of the old buildings (as they did) by August 2, 1939. The work of demolition included the clearance of the cellars under the

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old buildings, part of which were intended to be used in connexion with the new buildings to be erected, although further excavation would have been necessary. The evidence established that, at the time of entering into the contract for the work of demolition, the plaintiffs intended, after its completion, to proceed with their rebuilding scheme. By August, 1939, however, war was imminent, and the plaintiffs had granted permission to the fire-fighting services to use the site for training purposes. The building project remained in abeyance for the duration of the war but the judge found, as a fact, that the plaintiffs had never abandoned their project.

In November, 1948, the plaintiffs notified the London County Council that they intended to proceed with completion of the building. The council, purporting to act under the Town and Country Planning Act, 1947, refused to sanction what was described as development of the site. The plaintiffs thereupon applied to the Central Land Board for exemption from the payment of development charge. That application was refused.

By the present summons the plaintiffs asked, *inter alia*, whether (a) for the purpose of section 78 (1) of the Town and Country Planning Act, 1947,² they had before "the appointed day" (July 1, 1948) begun but not completed "works" for the erection of an office building on the site; (b) for the purposes of section 10 (3) of the Town and Country Planning Act, 1932,³

² Town and Country Planning Act, 1947, s. 78 (1): "... where 'any works for the erection or alteration of a building have been begun but not completed before the appointed day,' (July 1, 1948) 'then if immediately before that day those works could have been completed . . . in accordance with permission granted . . . under an interim development order . . . planning permission shall, by virtue of this section, be deemed to be granted under Part III of this Act in respect of the completion of those works.'"

³ Town and Country Planning Act, 1932, s. 10 (3): "Where an application for permission to develop land is made to the specified authority in manner provided by 'the order' (the General Interim Development Order of 1933) 'the authority may, subject to the terms

'of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application, and they shall be deemed to have granted the application unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing.'"

(5): "An applicant who is aggrieved by the refusal of the authority to consent to his application, or by any conditions imposed by them, may within twenty-eight days from the date on which he received notice of the decision of the authority, or such longer period as the Minister may allow, appeal to the Minister. . . ."

and the General Interim Development Order of 1933,⁴ they had, immediately before the appointed day, obtained a valid permission to complete the works, either in accordance with a consent under the order to the erection of the buildings granted to them by the London County Council on August 9, 1938, or by reason of that consent being deemed to have been granted unconditionally by the council, and whether they could immediately before the appointed day have completed the works in accordance with that permission.

Harman J. held, first, that "works" for the erection of a building had not been begun before July 1, 1948; and secondly, that immediately before that day the works in question could not have been completed in accordance with the permission granted under the Act of 1932.

Arthur Capewell Q.C., J. Ramsay Willis and V. M. C. Pennington for the plaintiffs, *Marks & Spencer Ltd.* In 1938 the London County Council, as the interim development authority under the Town and Country Planning Act, 1932, s. 10, and the General Interim Development Order of 1933, granted the plaintiffs' application for leave to build on the site in question. Under section 10 (3) of the Act of 1932 permission to develop land could be granted or refused subject to the terms of the General Interim Development Order of 1933. The authority might grant the application unconditionally or subject to such conditions as they thought proper to impose or might refuse the application. The subsection went on to provide that the authority should be deemed to have granted the application unconditionally, unless within two months they gave notice that they had decided to the contrary, stating the reasons for so doing. In order to entitle the plaintiffs to carry on the work after the war without first obtaining a new planning permission it must first be shown that under the Town and Country Planning Act, 1947, s. 78 (1), the works had been begun but not completed before July 1, 1948. The work of demolishing the existing buildings with a view to making room for the new buildings had been completed by August, 1939, but the new building had not been started in view

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⁴ The Town and Country Planning (General Interim Development) Order, 1933, para. 10: "The grant or refusal of permission by the interim development authority for development to proceed shall be in

"writing and, where the authority decide to grant permission subject to conditions, or to refuse permission, the reasons for their decision shall be stated in writing."

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of the imminence of war. The work of demolition of the old buildings was clearly done in order to make room for the new buildings. It is contended, however, that the "works had been begun but not completed" before July 1, 1938, the demolition of the old buildings being an essential part of the work of rebuilding. Harman J. was wrong in holding that because the demolition work had been the subject of one separate contract and there was no contract in existence for the erection of the new buildings, the works had not been begun. "Works" is now a term of art amongst builders and contractors and has a very wide meaning and covers demolition.

Our second submission is that the condition as to the time for the erection of the building imposed by the London County Council, in their letter of August 9, 1938, was ultra vires. Temporary user was not within the scope of section 10 (3) of the Act of 1932. Any condition imposed must be related to planning and a provision that a building must be completed within a specified period goes outside the statutory basis of the discretion conferred by section 10 (3).

Our third submission is that on the true construction of section 10 (3) an authority was bound to give reasons for any condition which it annexed to a planning permission. Accordingly, assuming the London County Council could validly impose the condition that the works should be completed within 18 months, no reason having been given for the imposition of this condition, it is void and under the terms of the section the permission must be deemed to have been given unconditionally.

[They referred to *Nalder and Another v. Ilford Corporation*⁵ and *Crisp from the Fens v. Rutland County Council*.⁶]

The plaintiffs should be treated as having an unconditional planning permission immediately before the appointed day. They are accordingly now entitled, under section 78 (1) of the Act of 1947, to complete the erection of this building and no further planning permission is required.

Geoffrey Lawrence Q.C. and *H. E. Francis* for the London County Council (who were not called on to argue that the imposition of a condition as to time was within the powers of the council). It is submitted that section 78 (1) of the Act of 1947 has no application here: first, because works for the erection of a building had not been begun before the appointed day. On this site the only works carried out were works of demolition.

⁵ [1951] 1 K.B. 822.⁶ (1950) 114 J.P. 105.

Demolition works are not "works" within the section. The plaintiffs had entered into no contract for the erection of the new buildings. "Works" means some operation for which, before the Act of 1947, planning permission was required. No such permission was required for demolition. The test to be applied is an objective test and does not depend on any intention in the mind of the developer or the existence of any contract to build. The question is: Were there any works on this site immediately before the appointed day? The answer must be "No." It was a cleared site. Where demolition is intended to be covered by the Act of 1947 demolition is expressly referred to.

[They referred to *Rector and Churchwardens of the Parish of St. Nicholas Acons v. London County Council*.⁷]

Secondly, it is submitted that the second limb of section 78 (1) was not satisfied because immediately before the appointed day the plaintiffs had not got a valid planning permission. It is contended that section 10 (3) of the Act of 1932 did not impose any duty on the authority to give reasons for any conditions it imposed. The section, on its true construction, only imposed an obligation to give reasons if planning permission were refused. Also, it is contended that failure to give reasons for any conditions imposed should not be held to result in planning permission being deemed to have been granted. This is a very technical matter. The reason for the imposition of most conditions appears from the conditions themselves. It is submitted that the permission of August 9, 1938, was not unconditional and the conditions as to time not having been complied with, these buildings could not immediately, before the appointed day, have been completed.

Denys Buckley for the Central Land Board. The Central Land Board only wishes to know whether a development charge should be assessed in respect of this building. It does not seek to argue the matter.

Arthur Capewell Q.C. in reply.

EVERSHED M.R. stated the facts and continued:—The permission which is contained in the letter of August 9, 1938, was indubitably a permission granted under an interim development order. It states on the face of it that it is given under the General Interim Development Order of 1933. If, therefore, the plaintiffs can satisfy, first, the condition that there were existing "works" for the erection of a building begun but not completed

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before July 1, 1948, and, further, if it can be shown that those works could have been completed immediately before July 1, 1948, by virtue of the permission contained in the letter of August 9, 1938, then the plaintiffs are deemed to have got permission under Part III of the Act of 1947 in respect of such completion—that is, “the completion” (to use the words of the subsection) “of those works.”

It is therefore a case in which the plaintiffs must surmount two fences; it was the view of Harman J. that they failed at each.

I turn to the first question, which has seemed to me to be a matter of great difficulty: Whether the first condition is satisfied that there were here “works” for the erection of a building begun but not completed on July 1, 1948. As regards that matter, the judge said⁸: “It is really a question of fact whether, ‘at the critical date, works for the erection of a building had ‘been begun but were not finished on the site. It was agreed ‘before me that ‘works,’ by reason of the use of the plural, ‘must connote physical operations on the site. It is clear that ‘the erection of a building need not have been begun, because ‘otherwise no meaning would have been given to the words ‘‘works for.’ It seems to me that if there had been here a ‘building contract which involved the demolition of the old ‘buildings before the erection of the new, it might well have ‘been possible to say that, though the performance of the ‘contract had proceeded no further than demolition of the old ‘buildings, that was nevertheless ‘works for’ the erection of ‘the new. This is not that case. Here the demolition contract ‘stands alone, the contractors’ work was finished and no further ‘contract ever came into existence. In my judgment, it is not ‘possible to say that the site as it was on the appointed day ‘contained works for the erection of a new building. I am ‘therefore of opinion that the plaintiffs fail.’”

The argument of the plaintiffs is that they have satisfied this formula because, they say, they began in 1939 an operation which consisted of works for the erection of a new building; they began by demolishing the old, but the works, taken as a whole, were not completed because they had not gone on to the erection of the new building for which the demolition was preparatory. Against this it is said that demolition works, though no doubt preparatory to works of erection, were in this case wholly distinct in themselves; they began and ended years before July, 1948,

⁸ [1951] W.N. 624, 625-6.

without any start at all having been made on any new building. In that regard there is no doubt that Harman J. was much influenced by the absence of a building contract; he appears to have placed emphasis on it in the passage I have read. Mr. Lawrence before us has not so much emphasized that particular aspect. His argument is that if you read the whole of this subsection the phrase "works for the erection of a building" is the same subject-matter as "those works," which is the phrase found later; that "those works" must have the quality that they are the subject of a permission granted; and that since here the demolition works were not so subject and were only connected with the proposed erection in the minds of the plaintiffs, therefore the formula is not satisfied and the plaintiffs, as the judge held, must fail.

Whatever is the position under the present Act of 1947—and Mr. Capewell, in his reply, has suggested that works of demolition are within the meaning of the word "works" at any rate for many purposes of that Act—it is, as I understand, clear that under the Act of 1932, save in the case of buildings scheduled as being of special interest or of works comprised within section 44, demolition, as such, is an operation which did not require any permission from the planning authority. A man might demolish buildings without any decision having been made by him at the time how afterwards he would seek to use the land, and, in that case, he would require no permission and the demolition of itself could not fairly in that case be said to be part of the totality of an operation which necessarily comprehended the erection of a building. The demolition clearly could not in that case, I should have thought, be "works for the erection of a building." I also have no doubt that in ordinary parlance and among those who are engaged in the trade of contractor, whether a building contractor or a demolition contractor, the word "works" in the plural is one of common currency and will or may certainly include works of demolition, excavation and the like. Indeed, in opening his case before us Mr. Capewell put it that the word "works" can be and should be construed, where you find it in these Acts, according to the context in which it from time to time appears. After looking at the relevant sections in both Acts, including definitions, I am bound to say that in their context here the words "works for the erection" do not strike me as *prima facie* intended to include works of demolition.

The point is obviously a narrow one, and, although on this matter I regret to find that my own conclusion is not shared by

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either of my brethren, I am, for my part, of opinion that Mr. Lawrence's argument is correct, and that on this part of the case the judge's conclusion ought to be sustained. I think there are two ways in which the matter may be tested: The first is this, the way I ventured to put it to Mr. Capewell in his reply. If (as it is said by him) there were on July 1, 1948, works for the erection of a building begun but not completed, then what were they? I took a note of Mr. Capewell's answer, and he said they were the demolition, the clearing of the basement so as to be incorporated in the new building, the erection of hoardings and a gate, and the preparation for building a new building—that is, the approval of the plan, plus the intention to build, and the building agreement. I am bound to say that I cannot, for my part, bring that concatenation of things within the phrase “works for the erection of a building.” It seems to me to resile from what has been said and accepted below, that “works” must be physical operations carried out on the land. My brother Jenkins suggested that a more prudent answer would be, “the totality of the operations to be carried out on the site as defined in “the building agreement.” I will assume that it was true to say, on July 1, 1948, that under the agreement with the Portman Estate the plaintiffs were bound to carry out the building operations necessary for the erection, on the site, of the new edifice which is illustrated on the plans; and, if it can be said that those operations had been begun and not completed, then it may well be that the plaintiffs' answer is right. I am not satisfied that, for the purpose of construing section 78, it is permissible to take into account the fact that the plaintiffs, the building owners, have made some arrangement or contract with a third party to erect a particular building. If that is right, it would appear to me to follow that if the plaintiffs could establish that they had made up their minds, apart from any obligation by contract, to erect a particular building, then it could equally be said that the demolition works were part of those total operations, though the total operations were merely, so to speak, in the minds of the plaintiffs. It may or may not be that demolition is something which requires permission under the new Act and did not under the old. I can well understand that plans put forward for approval may on the face of them show and include the demolition work which has to be done as part of the total operation, even though no planning permission would be required for the demolition taken by itself. Thus, to take the alternative in section 78 (1) of “works for the alteration of a building”

there would, I take it, appear on the plans submitted what had first to be taken down in order that the altered thing might be put in its place; and in all those cases I think it would be right to say that the first stages, which consisted of the destructive part of the work, were part of the "works for the erection or alteration of a building." And I also agree that the formula "works for the building" must have a wider significance than would be covered by the words "works of building." But that does not, in my judgment, suffice for the facts of the present case.

What I have said is perhaps another way of putting Mr. Lawrence's main argument, which is to this effect: that, if you read the subsection as a whole, the "works for the erection of a building" are "those works which could have been completed in conformity with the planning permission"; and when, in this case, you ask what those were, and you look accordingly at the permission given under the Act and Order, you find that the only works for which permission was given were works for the erection of a new building independently of (though no doubt based on the assumption of) a previous clearing of the site; and of those works, as distinct from the first clearing operation, there is not any doubt that they had not been begun at the material date.

As I have indicated, I think that the question is one, perhaps in large degree, of first impression; and when I come back and ask the question what were the "works for the erection of a building begun but not completed on July 1, 1948," I am not satisfied that an answer can be given by the plaintiffs which is satisfactory and which entitles them to say they are within the ambit of the protection.

I should, therefore, on that ground dismiss this appeal; but, as I have said, my brothers take a different view, and in the circumstances I must pass, though I shall deal with it briefly, to the second hurdle with which the plaintiffs are confronted. It is this: assuming that these are "works," and so forth, then are the plaintiffs now entitled to complete them by virtue of this planning permission given on August 9, 1938? I have already stated that on the face of the letter the answer would be in the negative because, the work not having been completed within 18 months from August 1, 1938, the consent is expressed to have become null and void. But the first point taken by Mr. Capewell is that this condition is wholly void and ineffective, because there is no power in the planning authority to impose a condition as to time. The judge rejected that view, and I reject it also;

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on the simple ground that I find nothing in the relevant terms of the Act to limit the conditions which may be imposed so as to exclude conditions of time. Subsection (3) of section 10 of the Act of 1932 provides: "Where an application for permission to develop land is made to the specified authority in manner provided by the order, the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application." I can find nothing in that context, or anywhere else in the Act—for instance in paragraph 19 of Sch. II, to which we were referred—which would entitle the court to say that the words "subject to such conditions as they think proper to impose" must be read with the qualification "provided that they are not conditions as to time." I therefore reject that part of the answer.

Another question raised by Mr. Capewell is much more difficult, though it turns again, I think, as did the first, very much upon a first impression of the language used. The argument used is that by the effect of the subsection which I have partly read, to which can be joined the terms of the Order of 1933, no condition can be validly imposed unless reasons for its imposition are given. The effect, therefore, if that argument is right, is either that under the terms of the rest of the subsection the London County Council is to be deemed to have granted an unconditional permission; or this permission, granted on August 9, may be treated as unembarrassed by the conditions which were invalidly added to it.

Section 10 (3) of the Act of 1932 refers to the terms of the order, and that order is the one mentioned in the first subsection: "The Minister shall make a general order with respect to the interim development of land," and he did make a general order of 1933. Subsection (3) continues as follows: "and they"—that is, the planning authority—"shall be deemed to have granted the application unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing." If it is permissible to have regard to the order, the matter appears to be tolerably plain, because paragraph 10 of the order is: "The grant or refusal of permission by the interim development authority for development to proceed shall be in writing and, where the authority decide to grant permission subject to conditions, or to refuse permission,

"the reasons for their decision shall be stated in writing." It is, therefore, beyond doubt that the terms of the order state that a conditional grant of permission shall contain in writing the reasons for the conditions imposed or at least for the imposition of conditions. Mr. Lawrence said that the order cannot have the effect of increasing the obligations imposed by Parliament on the authority. I am not quite sure that that is right, because the first subsection requires the Minister to make a general order with respect to interim development, and the third subsection says that where an application for development is made "the authority may, subject to the terms of the order, grant the application," etc.

But assuming in Mr. Lawrence's favour that the matter does depend, and depend exclusively, upon the terms of the subsection itself, then the question revolves round the simple question what is meant by the phrase "they have decided to the contrary." To the contrary of what? That is the problem. It is not, I am bound to say, a happy piece of phrasing, and it has led to long arguments and many suggestions as to what might be meant by those words "to the contrary." If it means they have decided not to grant, unconditionally, an application, then presumably a decision to grant a conditional permission would be "to the contrary." But Mr. Lawrence suggested that "to the contrary" in its context really means that they have decided to refuse permission altogether. I have, on the whole, been unable to accept that view. I do so with some regret because I must say that it seems to me extraordinary that the authority are required to give reasons for every condition that they impose, even though the reasons for the imposition of the condition are absolutely obvious. Thus, to take the example given by my brother Jenkins, if permission is granted subject to a proper fire escape being provided, it seems absurd that the authority must say: "The reason for this condition is so that people should be able to escape from the building in case of fire." However, the question is what is the true interpretation of the words used. There is no doubt that at the back of it lies this important consideration, that there is given to the applicant an opportunity, if he feels aggrieved, of going by way of appeal to the Minister.

I turn accordingly to subsection (5), which seems to me to contain within it the answer to this problem. Subsection (5) is: "An applicant who is aggrieved by the refusal of the authority to consent to his application, or by any conditions imposed by them, may within twenty-eight days from the date on which

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"he received notice of the decision of the authority, or such longer period as the Minister may allow, appeal to the Minister." Three possibilities are envisaged in subsection (3), namely, unconditional permission, absolute refusal, or permission subject to conditions. When you turn to subsection (5) it is dealing indifferently with the second and the third. It deals with the case of absolute refusal and also with permission subject to conditions. Both those are spoken of as "decisions" of the authority, which refers you back, I think, to the "decision" mentioned at the end of subsection (3), where the language is "give notice . . . that they have decided to the contrary." If that be right, it must follow necessarily that a decision "to the contrary" comprehends a decision to grant permission subject to conditions. If that is so, this matter must be decided in the plaintiffs' favour. I add that, although it is easy to see cases (I have given an example) where it seems supererogatory to have to give reasons in writing, I can also see that it would be difficult for an applicant, who is aggrieved, to put his case or even to give satisfactory reasons for his dissatisfaction, unless he were given reasons by the planning authority why they have imposed a particular condition. If an appellant appeals against the imposition of a condition without knowing why it is imposed, it is obvious that he might be faced on appeal with an explanation by the planning authority which would make it impossible for him to argue, or put him in the difficulty that he had come unprepared to deal with what turned out to be, the real point to be argued.

For those reasons I take a different view on this point from that which the learned judge took. It turns on the meaning of a few words. Having regard to the view I take on the first point, I think that the appeal should be dismissed, but having regard to the conclusion reached by my brothers the appeal must be allowed.

JENKINS L.J. To my regret I find myself unable to agree with my Lord as regards the answer to the first question in this case, that is to say, the question whether, on the facts, the plaintiffs had, with respect to their Paddington Street and Chiltern Street site, begun works for the erection of a building. The facts, if I might briefly recapitulate them, were these. The plaintiffs had entered into a building agreement with respect to the site, under which the plaintiffs were bound, directly or indirectly, to the Portman Estate to erect a building in accordance with certain

plans and specifications approved by the Portman Estate. Further, the plaintiffs had obtained planning permission, subject to the conditions which my Lord has mentioned, for the erection of that same building. Further, with a view to carrying out the project and in accordance with their contractual obligations under the building agreement, the plaintiffs had cleared the site for the erection of the projected new building, although the supervening difficulties occasioned by rumours of war and ultimately by war itself had prevented them from carrying the project any further than that.

Those being the facts in barest outline, had any works for the erection of a building been begun on this site but not completed before the appointed day, within the meaning of section 78 (1) of the Act of 1947? The answer to that question turns in the end on the meaning to be attached to the phrase "works for the erection or alteration of a building" contained in the subsection. But, in approaching the construction of that phrase, it seems to me legitimate to bear in mind that the manifest object of section 78 (1) was to accord some measure of protection to a building owner, who, on the faith of planning permission given under the law as it stood before the commencement of the Act of 1947, had incurred expenditure and done work with a view to the carrying out of a building project covered by such permission. Therefore, it seems to me, that the intention of the section makes it of relatively little importance whether the actual work in question is work of demolition or of construction or of anything else, provided it is clear on the facts that that work did genuinely form part of the operations necessary to carry out a building project which would have been permitted under the old law.

Returning to the phrase against that background, it is "works for the erection or alteration of a building." That phrase seems to me to be a phrase of wide import, and the inference is that it was adopted so as to cover a wide field of work. If the legislature had intended to confine the application of section 78 (1) to cases where buildings had been begun but had not been completed, inevitably the section would have run: "Where the erection or alteration of a building has been begun but not completed." Here we have "works for the erection or alteration of a building," so as to include, in terms, operations which are not in themselves building operations. For my part I find irresistible the conclusion reached by the judge as to

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the meaning of these words when he said: "It is clear that the erection of a building need not have been begun, because otherwise no meaning would have been given to the words "works for.'" It is, therefore, in my view, not necessary, in order to bring a case within the subsection, that one should be able to point to some work of construction on the site and say: "That is part of the new building the erection of which has been begun." It is enough if, on the facts, one can conclude that on the site in question operations have been carried out which are part of the totality of operations necessary on that site for the purpose of carrying to completion a particular building project. Where it is shown by the evidence that a building owner had in view a particular building project to be carried out on a site already built upon, and that his intention to carry out that project had never been abandoned, then work such as the demolition of the buildings already on the site, as a necessary preliminary to the carrying out of the building project, would, in my judgment, be "works for the erection or alteration of a building" within the meaning of the subsection. Of course, where the works are of such a nature that in themselves they might or might not be works which were being carried out for the purpose of executing some particular building project, it may well be that the onus is then on the building owner to show, and to show clearly, that his intention from the outset had been to carry some particular building project through to a finish. Obviously, where a man had started pulling down a house with no more than a general intention of erecting something else in its place, he could not come within the subsection. Indeed, the very frame of the subsection and the whole scheme of the Act would exclude such a one from the benefit of the subsection, for section 78 (1) in itself contemplates, and necessarily refers only, to a case where there is a projected building or alteration in respect of which planning permission has been obtained.

In the present case, on the footing that the construction of the phrase "works for the erection or alteration of a building" which I have adopted is the right construction, there is, to my mind, no doubt that in commencing and carrying out through their contractors the demolition of the existing buildings, the plaintiffs had begun works for the erection of a building. There is no doubt about their intention. There is no doubt about the identity of the projected building. Not only was it the building referred to in the planning permission obtained in 1938, but it

was also the building which the plaintiffs were under contract, directly or indirectly, with the Portman Estate to erect. The judge, as appears from his judgment, might well have come to the same conclusion as I have reached but for the fact that the plaintiffs, in the events which happened, entered into a contract for the demolition of the existing buildings with a demolition specialist who did not undertake any of the work of constructing the new building; whereas, so far as the work of constructing the new building was concerned, they had dealt with that separately through a firm named Bovis Ltd. and had only made provisional arrangements with them for the building work, not amounting to a firm contract. But for my part, provided it is plain that the building owner concerned did genuinely intend to erect a particular, identifiable, projected building on the site of existing buildings, it cannot matter what contractual arrangements he may have made as regards the demolition of the old buildings and the erection of the new one. That is to say, the answer cannot depend on whether he has got one contractor to pull down and rebuild or has got two contractors, one of whom is going to do the demolition and the other the construction. Here I think the projected building is well identified, if only by reference to the building agreement.

The argument to the contrary, pressed upon us by Mr. Lawrence, was to this effect. He said that the test to be applied in seeing whether given work qualified for the benefit of section 78 (1) was a purely objective test, that one must go to the site and see whether there was any work begun but not completed upon the site for which planning permission was required and had been obtained. Nothing short of that, according to him, would come within the subsection. He put his contention by way of three propositions; he said that for section 78 (1) to apply: (a) there must be works which have been begun; (b) those works must be uncompleted; and (c) they must be part of an operation which did require planning permission. He pointed out that demolition was not in any relevant respect an operation which required any planning permission at all; the work which had been begun here, he said, was simply the work of demolition, for which no such permission was necessary: therefore it did not fall within the words in section 78 (1) "those works could have been completed in conformity with the provisions of a planning scheme or of permission granted thereunder, or in accordance with permission granted by or

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"under an interim development order." Planning, he said, was quite irrelevant to demolition. In my view that construction contains this fallacy. It treats "those works" as the particular type of work or type of operation that has been actually embarked upon. Of course, if one applied section 78 (1) to mere work of demolition taken by itself and treated that as "those works," there would be no question of those works having been the subject of permission, and it would be reasonably plain that the section did not apply. Moreover, the demolition, as such, if treated as a separate thing, would not only have been begun, but would have been completed. But, in my view, that is wrong. I think "those works" must mean the works for the erection or alteration of the particular building referred to earlier in the subsection. I think that must be so, for the test of the application of the subsection, where it is satisfied in other respects, must, as it seems to me, be whether the permission was granted for the carrying out of the projected building operations to completion and not whether permission was granted for some mere branch or department of the work. If "those works" is construed in that way, I think the argument no longer applies.

Mr. Lawrence also suggested that "works" in this context should be construed as meaning works which have something in the nature of a physical presence on the land, as opposed to mere demolition, which cannot be said to leave anything physically present on the land but merely produces an empty space where buildings existed before. He referred us to a number of sections where there were references to (for instance) the demolition or alteration of any buildings or works, or to decisions that any buildings or works should be altered or removed; and there is no doubt that there are through the Act a number of references to works in contexts which show that "works" are regarded as physical objects. But I do not think it follows that in every case "works" is to be given that meaning. For instance, in section 30 (6) of the Act of 1947, which is one of the sections dealing with ancient buildings, there is the passage, to which Mr. Lawrence referred us, to the effect that so long as any building is included in any list compiled or approved under this section no person shall execute, or cause or permit to be executed, any works for the demolition of the building; and Mr. Capewell referred us to section 44 of the Town and Country Planning Act, 1932, which provided, as to works below high-water mark, that "Nothing in this Act shall authorize the execution of any works whether of construction, demolition or alteration on, over or

"under tidal lands below high-water mark of ordinary spring tides." Therefore it seems to me that the word "works" is well capable in this legislation of including works of demolition, and I think that is in accordance with ordinary English usage in the field of building operations, where the expression "works" is current.

The point is a short one and does not admit of any great elaboration. As my Lord has said, it is largely a matter of first impression. We were pressed by Mr. Lawrence with the absurdities that might arise if the plaintiffs' construction of the subsection were adopted. What, it is said, of a man who, allegedly with a view to the ultimate erection of a new building, sets about demolishing an existing building and has got no further than removing two tiles or a gutter? It is suggested that in a case of that kind it would be absurd to give the individual in question the protection of section 78 (1), even though the project, of which the removal of the two tiles or the gutter was the beginning, was a project in respect of which in all relevant matters planning permission had actually been obtained under the old law. But arguments by way of *reductio ad absurdum* cut both ways; and, on the other hand, it might equally be said to be absurd that a building owner, who had spent thousands of pounds on the demolition of valuable buildings with a view to erecting another building in their place, should not be protected merely because he had not actually started the building work, while another person, who had prepared his site at far less cost, should be protected because his work had just arrived at the stage of construction and it was possible by diligent search to find somewhere on the site two bricks laid one on top of the other in the positions which they would respectively occupy in the completed building. As I have said, it is a question of first impression, and I will say no more about it except that, after giving the best attention I can to the arguments the other way, and with some diffidence owing to the different opinion of my Lord, I have come to the conclusion that the plaintiffs, within the meaning of section 78 (1), had begun works for the erection of a building on the site in question before the appointed day but had not completed them before the appointed day, with the result that the plaintiffs are entitled to succeed in this case provided they can bring themselves within the second branch of the subsection.

To do that, as my Lord has said, they must show that immediately before the appointed day those works—that is, as I

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construe the subsection, the totality of the building operations—could have been completed in conformity with the provisions of a planning scheme or of permission granted thereunder or in accordance with permission granted under an interim development order. If that was so, then in the words of section 78 (1), “ . . . if any permission required under the Restriction of Ribbon “ Development Act, 1935, for the carrying out of those works “ was granted ”—nothing turns on that in this case—“ planning “ permission shall, by virtue of this section, be deemed to be “ granted under Part III of this Act in respect of the completion “ of those works.” That depends on the effect of the conditional planning permission of August 9, 1938, having regard to the terms of section 10 of the Act of 1932 and of paragraph 10 of the General Interim Development Order of 1933. The vital provision in section 10 is subsection (3), to which my Lord has already referred: “ Where an application for permission to develop land “ is made to the specified authority in manner provided by the “ order, the authority may, subject to the terms of the order, “ grant the application unconditionally or subject to such “ conditions as they think proper to impose, or may refuse the “ application, and they shall be deemed to have granted the “ application unconditionally unless within two months from “ the receipt thereof, or within such longer period as the appli- “ cant may agree in writing to allow, they give notice to him “ that they have decided to the contrary, stating their reasons “ for so doing.”

The whole matter, so far as it depends on section 10 (3), turns on the meaning of the words “ to the contrary.” As a matter of language, I think it is reasonably plain that “ notice “ . . . that they have decided to the contrary ” must mean notice that they have decided not to grant the application unconditionally, the words being “ they shall be deemed to have “ granted the application unconditionally unless . . . they give “ notice . . . that they have here decided to the contrary.” In my view that must mean that they have decided not to grant it unconditionally. It is said, on the other side, that “ to the “ contrary ” connotes an exact opposite, a complete negation of what has gone before, as opposed to a mere variation of what has gone before, and it is suggested, therefore, that “ decided “ to the contrary ” means “ decided not to grant it.” With respect to those who think otherwise, I cannot accept that, as a matter of language. But if it is accepted, it seems to me that grave difficulties ensue, for then the relevant part of subsection (3)

reads like this: "The authority may . . . grant the application "unconditionally or subject to such conditions as they think "proper to impose, or may refuse the application, and they "shall be deemed to have granted the application unconditionally "unless . . . they give notice . . . that they have decided not "to grant the application, stating their reasons for so doing," and that would apparently produce the result that they could never grant an application conditionally, because in all cases they would be deemed to have granted the application unconditionally, unless they gave notice that they had decided not to grant the application at all.

Accordingly, I think that subsection (3) of section 10 really admits of only one construction. I appreciate the force of the judge's observations to the effect that one can understand that, where unqualified refusal was in question, it was very desirable that reasons should be given, but that where it was merely a matter of imposing conditions and, subject to those conditions, allowing the application, it was not apparent why reasons should be considered necessary, for the applicant would receive his permission with the conditions upon which it was granted stated for him to see, and would, therefore, for the purposes of any appeal, know exactly what the conditions were. I also agree with my Lord that one can imagine examples where the giving of reasons for the imposition of conditions would be a palpable absurdity. But these considerations, in my judgment, are not enough to override what seems to me to be the reasonably plain language of section 10 (3). My Lord has referred to the support which this construction derives from subsection (5) of the same section, and I need not take up time by developing that point again. One may add that the Town and Country Planning (Interim Development) Act, 1943, which reversed the former rule and enacted (in effect) that permission should be deemed to be refused unless it was granted, seems to assume the construction of section 10 (3), which I have placed upon it, for one finds in section 2 (5) of the Act of 1943 that "Nothing in this section shall be construed as "affecting the duty of an interim development authority . . . " (b) to give notice to the applicant of their decision upon the "consideration of any such application, including, where the "application is refused or granted subject to conditions, a statement of the reasons for their decision." I am therefore of opinion that inasmuch as the authority here failed to state their reasons for granting the permission of August 9, 1938, subject to conditions and not unconditionally, they must be deemed by

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Other grounds of objection to this form of permission were urged before us which would lead to substantially the same consequences. Mr. Capewell endeavoured to persuade us that the first condition, which imposed a time limit for the completion of the work after which the consent was expressed to become null and void, was wholly ultra vires and, therefore, bad. I cannot take that view, for section 10 (3) expressly empowers the authority to grant the application subject to such conditions as they think proper to impose, without anything relevant to the question of time to suggest that the generality of that expression is to be in any way cut down. There is nothing expressly to the effect that conditions as to time are not to be imposed, and I can find nothing in the other provisions of the Act which would make the imposition of a time condition so palpably repugnant as to be by necessary implication outside the purview of the Act, and, therefore, ultra vires. Accordingly, I cannot accept the argument based on the contention that the condition was ultra vires, though the plaintiffs achieve the same goal by a different road.

It only remains to mention paragraph 10 of the General Interim Development Order of 1933, which says in express terms: "The grant or refusal of permission by the interim development authority for development to proceed shall be in writing and, where the authority decide to grant permission subject to conditions, or to refuse permission, the reasons for their decision shall be stated in writing." That reinforces the view that the authority is placed under a statutory duty to give reasons for its decision where the decision is to grant permission subject to conditions or to refuse permission, and I think the result might well have been that failure by an authority to give reasons would have enabled an aggrieved applicant, by appropriate process, to obtain an order upon them to state their reasons. But I am not satisfied that paragraph 10 of the order would in itself affect the actual validity of a refusal or the actual validity of conditions purporting to be attached to a consent. I prefer, therefore, to base myself simply upon the construction of section 10 (3), and the construction which I have placed on that subsection leads, as I have said, to the conclusion that permission must be deemed to have been granted.

It follows, in the view I take, that the plaintiffs succeed on both the questions on which their claim to the benefit of section

78 (1) depends, and they are accordingly entitled to such benefit. The appeal should therefore be allowed.

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MORRIS L.J. The first question which arises in this appeal is whether the plaintiffs bring themselves within the opening words of section 78 (1) of the Town and Country Planning Act, 1947. The inquiry is raised whether works for the erection of a building had been begun before the appointed day, namely, July 1, 1948. The Act of 1947 contains a number of definitions. There is a definition of the phrase "buildings or works," but no definition is to be found of the word "works." The word "erection" is defined as follows: "'erection' in relation to 'buildings includes extension, alteration and re-erection.'" The phrase "building operations" is defined to include "rebuilding 'operations, structural alterations of or additions to buildings, 'and other operations normally undertaken by a person carrying 'on business as a builder.'" There is also a definition of the word "clearing," which, "in relation to land, means the removal 'of buildings or materials from the land, the levelling of the 'surface of the land, and the carrying out of such other operations 'in relation thereto as may be prescribed by regulations made 'for the purposes of this Act.'" There is, of course, a definition of "development," which I do not read.

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In the course of his submissions on this part of the case Mr. Lawrence submitted that the word "works" should be interpreted as denoting some positive operations of a constructional nature. Another part of Mr. Lawrence's submissions was that when the word "works" in the second line of section 78 (1) is compared with the phrase "those works," to be found in the fourth line of section 78 (1), it is manifest that there is a reference to the same thing, and Mr. Lawrence submits that the reference is to what he has described as the "controlled operations." So he submits that the word "works" denotes operations of a positive, constructional nature for which permission was needed; and he submits that permission was not needed under the Act of 1932 for demolition. In support of the first of those two submissions to which I have referred, Mr. Lawrence has invited our attention to a number of sections of the Act of 1947 where the word "works" is to be found. He has, for example, referred us to section 30 (6); he has referred us to section 23 (2), and to section 26 (1) (b); and to other sections. In some places the reference is to the words "buildings or works." We were also referred, by Mr. Capewell, to section 44 of the Act of 1932. The

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word "works" also appears in this part (namely, Part VIII) of the Town and Country Planning Act, 1947, in section 75, which begins with the words "Where any works on land existing at the "appointed day were carried out."

In the absence of any definition of the word "works," it seems to me that the word is not to be regarded as a term of art but that it is really quite a wide phrase. The word may not be used in all places with precisely the same meaning. It has, in my judgment, in section 78 the meaning of things done or to be done. I do not myself attempt any definition of the word, for the obvious reason that, since Parliament has not defined it, it would be unnecessary and perhaps unfortunate to attempt a definition. The word is a wide word. It is, for example, used in ordinary speech in the phrase "works of charity," presumably to denote no more than things done of a charitable nature. In its context in section 78 (1), in my judgment, the word refers to the totality of things necessary to be done for the purpose of erecting a building. The phrase has to be regarded in reference to the facts of each particular case. The question whether works for the erection of a building have been begun becomes, in my judgment, really a question of fact and of degree, depending on the circumstances of each particular case.

What happened in the present case was that after the plaintiffs had, in August, 1938, obtained the consent which they received from the London County Council under the General Interim Development Order of 1933, they then proceeded to get tenders for the erection of a building, including demolition and the clearance of the site. They received a number of tenders, but each one of the tenders received exceeded the amount that they had been led to expect would be the probable amount having regard to figures supplied to them by their quantity surveyor. So it was decided to entrust the work to Bovis Ltd. Because of the international situation there was delay. By the early part of the next year the Portman Estate were pressing the architects to begin building operations. In paragraph 9 of an affidavit filed on the plaintiffs' behalf this is said: "By March, 1939, however, the Portman Estate, as freeholders, were pressing the company through its architects to commence building operations in accordance with the agreement . . . and pointed out that the agreement provided for completion of the entire building by the month of December, 1939. Accordingly in April, 1939, the company decided to commence building operations and as a first step to proceed with

“ the necessary works of demolition and clearance from the site
“ of all existing buildings.”

The judge says in his judgment as follows: “ The estate
“ manager of the plaintiffs, who was cross-examined before me,
“ stated that when the plaintiffs entered into this contract they
“ intended to proceed, after the demolition was completed, with
“ their rebuilding scheme. This evidence I accept. Indeed, the
“ conclusion seems obvious, for persons in the plaintiffs’ position,
“ who are paying some £800 a year in rent, do not demolish
“ buildings which might reasonably be expected to let for a con-
“ siderable part at any rate of that sum unless they intend to
“ replace them by other buildings more to their purpose.” To
me it seems that the effect of the evidence accepted by the judge
was that the plaintiffs, after a delay, did decide to begin works
for the erection of a building. It does not seem to me to matter
at all that one part of the works was assigned by contract to one
contractor and that the rest was to be undertaken by another
contractor. It might be, in the circumstances of a different case,
that work of demolition could not be described as “ works for
“ the erection of a building.” But, as I have indicated, in my
judgment, the matter is really one of fact and degree, depending
upon the circumstances of each case, and in this case, in my
view, the plaintiffs did decide to begin and did begin works for
the erection of their new building.

In regard to the second of the two submissions of Mr. Lawrence
to which I referred, in my judgment the works “ could have been
“ completed in accordance with permission granted under an
“ interim development order,” assuming that that permission was
valid. The works must be deemed to be the totality of what had
to be done to erect the building. Those works could have been
completed in accordance with the permission granted. The words
in section 78 (1) do not involve that permission is needed for
each and every part, phase and deed, provided that the work of
erection can be completed within the ambit of permission so that
when the building is complete nothing is out of conformity with
or out of accord with or beyond any permission given where any
permission is required.

With a diffidence which I naturally feel when I find that my
opinion does not coincide with that of my Lord, the Master of
the Rolls, I have reached the conclusion on this first question
that the plaintiffs had begun works for the erection of a building
before the appointed day.

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The second question is whether there was permission under the General Interim Development Order of 1933. Section 10 of the Act of 1932 is in different terms from section 45 of the Town Planning Act of 1919, and the General Interim Development Order of 1933 is in different terms from the previous General Interim Development Order of 1922. Under that Order, by paragraph 7, it was provided: "The local authority shall as soon as may be inform the applicant in writing that his application for permission to proceed is granted or refused, as the case may be, and if the application is granted, shall state in writing the terms of any requirements which they may impose." But the Act of 1932 introduced new language, and the language of section 10 (3) calls for consideration. I need not refer to section 2 of the Act of 1943, which has been referred to by Jenkins L.J. The provision in that Act is not decisive, but it is at least interesting to note the interpretation that then was assumed.

In regard to the question whether it was legitimate to impose a condition in regard to time, I am in full agreement with all that my Lords have said and I do not desire to add anything. Section 10 (3) provides that three courses may be followed, and they are stated in this order: first, the authority may grant unconditionally; or, secondly, they may grant subject to conditions; or, thirdly, they may refuse. The section then goes on to provide that they shall be deemed to have granted unconditionally unless within two months they shall give notice "that they have decided to the contrary, stating their reasons." That, in my judgment, means, to the contrary of granting unconditionally, which was the first of the three possibilities. What, then, is the contrary, or the opposite, of granting unconditionally? Perhaps the most obvious opposite is No. 2, namely, granting conditionally; but also there is No. 3, namely, refusing. It seems to me, therefore, to follow that the application was to be deemed to have been granted unconditionally, unless two things were done: first, unless there was notice that the authority had decided to the contrary of granting unconditionally, and, secondly, unless they had given reasons. There is no dispute that in the present case the authority did not give reasons. It therefore follows that they must be deemed to have granted permission unconditionally. It is no answer to say that reasons might have been given which would have been poor in quality or in quantity, or which might have contained glimpses of the obvious.

The result, therefore, is that in my judgment, following the words of section 78 (1) of the Act of 1947, planning permission

should, by virtue of the section, be deemed to be granted under Part III of the Act of 1947 in respect of the completion of those works. From that conclusion the consequence as to development charge follows. I am, therefore, in agreement that this appeal should be allowed.

Appeal allowed.

Leave to appeal to the House of Lords.

Solicitors: J. C. L. Parry; J. G. Barr, Solicitor London County Council; Treasury Solicitor.

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In re BRADWELL. GOODE v. BOARD OF TRUSTEES
FOR METHODIST CHURCH PURPOSES.

[1951, B. 5505.]

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June 19.
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Charity—General charitable intention—Valid gift—Possible surplus—Accumulations—How applicable after expiration of period allowed by law—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 164; Sch. 7.

A testator, who died in 1914, directed his trustees (after the determination of certain life interests) to hold his residuary estate, together with his house in a certain village, on trusts, which, although they were not immediately practicable, were valid and effectual charitable trusts. He also directed that, if at the end of any one year there should be any surplus income, it should be appropriated to a fund to support a resident Wesleyan minister in the village:—

Held, that, although the trust to accumulate surplus income violated the provisions of s. 164 of the Law of Property Act, 1925, as there was a general charitable intention, it was applicable *cy-près*, to the exclusion of the next-of-kin and heir-at-law.

Martin v. Margham (1844) 14 Sim. 230, followed.

Wallis v. Solicitor-General for New Zealand [1903] A.C. 173, and *In re Monk* [1927] 2 Ch. 197, considered.

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By his will dated June 24, 1911, a testator, who died on February 12, 1914, directed that, after the determination of certain life interests (the last of which was determined in 1945), his trustees should hold his residuary estate and his house, known

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as Granby Villa, on trust to permit Granby Villa "to be used
" . . . as a cottage hospital or as a convalescent home for
" persons recovering from illness or for such other charitable
" purposes for sick infirm and needy inhabitants of the said
" township of Bradwell or children of such inhabitants as my
" trustees shall think proper and to apply the income of the said
" residuary trust funds in or towards the maintenance upkeep
" and support of the said Granby Villa and all additions to and
" extensions thereof. . . . I direct that duly qualified persons
" who or whose parents were born in the said township of
" Bradwell shall at all times have preference for benefits under
" the charities hereinbefore mentioned over other persons and
" if at the end of any year there shall be any surplus income
" remaining after providing for such maintenance upkeep and
" support and any extensions and additions as aforesaid then I
" direct my trustees to appropriate such surplus income towards
" a fund to be called the 'Bradwell Wesleyan Methodist Endow-
" ment Fund' and to invest all monies so appropriated and to
" pay and apply the income thereof towards the maintenance and
" support of a resident Wesleyan Methodist minister at Brad-
" well aforesaid for so long as such minister shall personally
" reside in the village of Bradwell."

A summons was taken out by the surviving executor and one of the trustees of the will, and in answer to one of the questions it was held that the residuary estate and Granby Villa were held on valid and effectual charitable trusts. A further question was raised: "Whether the trust expressed for the support of a Wesleyan Methodist minister is void as infringing the Accumulations Act, 1800, and section 164 of the Law of Property Act, 1925.¹"

Wilfrid M. Hunt for the plaintiffs.

John Monckton for the next-of-kin. The next-of-kin are entitled to the accumulations as the period of accumulation has exceeded the statutory period of 21 years prescribed by section 164 of the Law of Property Act, 1925, which takes the place of

¹ Law of Property Act, 1925, s. 164: "(1) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period

"than one of the following, namely:
"(b) a term of 21 years from the death of the grantor, settlor or testator. . . ." Seventh Schedule: "Enactments repealed. . . . The Accumulations Act, 1800. The whole Act."

the Accumulations Act of 1800—that statute having been repealed by Sch. 7 to the Act of 1925.

Allan Heyman for the defendant Board. The provisions of section 164 are excluded where there is a general charitable intention, and the next-of-kin and heir-at-law are not entitled to any accumulations. *Martin v. Margham*² is a case in which that result is clearly laid down, and it is supported in the Court of Appeal by *In re Monk*.³

N. S. S. Warren in the same interest. See also *Wallis v. Solicitor-General for New Zealand*.⁴ A passage in Lord Macnaghten's speech⁵ is a very convenient summary of the principle from an authoritative quarter, though it does not specifically deal with accumulations.

ROXBURGH J. The point is one, I think, of some difficulty, and, but for the authorities to which I am about to refer, I might well have decided it differently.

[His Lordship read the material trusts of the will, and continued:] There were some prior interests under the will, and when those interests came to an end, Granby Villa was occupied by a statutory tenant and, therefore, obviously the first trust was not immediately practicable. On the other hand, as I have already held, though the premises could never in any circumstances be used as a cottage hospital or a convalescent home, there are other charitable purposes specified in the will for which the premises could most conveniently be used as soon as, or shortly after, vacant possession had been obtained. Therefore, the question is, in those circumstances, whether the next-of-kin and heir-at-law—because this testator died at the time when the old legislation was operative—have any interest in the income or rents and profits either before the actual establishment of the charitable institution or afterwards.

Prima facie, in my judgment, the answer would be clearly in the negative, because it is plain that the testator, as from the date when the prior interests determined, intended to devote Granby Villa and the whole of the residue to charity—not one charity; in fact, two charities—but to charity. To such a situation prima facie the well known passage in Lord Macnaghten's speech in *Wallis v. Solicitor-General for New Zealand*⁶ would apply: "But it is well settled, as stated in Tudor's Charitable

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² (1844) 14 Sim. 230.

³ [1927] 2 Ch. 197.

⁴ [1903] A.C. 173.

⁵ *Ibid.* 185.

⁶ [1903] A.C. 173, 185.

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“Trusts, 3rd ed., p. 53, that where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all.” There is a further passage in Tudor, 5th ed., on p. 181, which says: “If the charitable trust takes effect there can be no resulting trust.”

However, in the present case there is a direction to accumulate which plainly violates the provisions of section 164 of the Law of Property Act, 1925, because 21 years had already expired when the prior interests determined. Accordingly, this direction to accumulate offends against section 164, which says that such a direction shall be void “and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.”

I must confess that, but for the two authorities to which I am going to refer, I should have thought that that statutory direction might be imperative, and that as there is no gift for the Wesleyan Methodists, except that which arises out of the execution of the trust for accumulation, there might be a great deal to be said for the view that there was an imperative direction in the statute which in the circumstances operated to bring about a trust in favour of the next-of-kin and the heir-at-law—in favour of the next-of-kin as to personalty and in favour of the heir-at-law as to realty.

But there seems to be a long-standing authority which is inconsistent with that view, and it is an authority which has undoubtedly received the approval of the Court of Appeal. I can see no material difference between *Martin v. Margham*⁷ and the present case on this point. In *Martin v. Margham*⁷ the testator “bequeathed the whole of his property to trustees in trust to convert the same into money and to invest the proceeds in the 3 per cents, and, after paying certain annuities, to add the dividends to the capital until it should produce an income of £600 a year; when he hoped that every five years’ receipt of that income would produce an increase of income of £150 a year; and his will was that every such increase of income should be appropriated as he should thereafter specify,” for

⁷ 14 Sim. 230.

the benefit of certain charity schools. It will be noticed that there is no charitable gift there independent of the trust to accumulate. What is there given is an interest in the proceeds of the trust for accumulation and nothing else. At that date, 1844, the Act of 1800 was in force. It was argued by Mr. Cooper and Mr. Lloyd for the next-of-kin "that the accumulation directed by the testator was perpetual; that, regard being had to the amount of his property, which did not exceed £8,800, to the price of stock and to the annuities, which amounted nearly to £200 a year, the accumulation must necessarily continue for a much longer time than the law permitted; and, therefore, the direction to accumulate and all the other ulterior gifts must fail, and the next-of-kin must be declared to be entitled to the property, subject to the payment of the annuities." The Vice-Chancellor interposed and said: "The whole scheme of the will, so far as the charities are concerned, is founded on a legal impossibility." None the less he held that the next-of-kin were excluded altogether. He began his judgment by saying: "Although the particular mode in which the testator meant the benefits to be doled out to the objects of his bounty cannot take effect"—that means, I am sure, "in law cannot take effect" because I must read that in conjunction with his interlocutory observation: so he is saying, as I understand it, "although the particular mode in which the testator meant the benefits to be doled out to the objects of his bounty cannot in law take effect, yet, as there is confessedly a devotion of his personal estate to charitable purposes, my opinion is that his next-of-kin have no claim at all to his property. I conceive that, if a testator has expressed his intention that his personal estate shall be, in substance, applied for charitable purposes, the particular mode which he may have pointed out for effecting those purposes has nothing to do with the question whether the devotion for charitable purposes shall take place or not; and that, whatever the difficulty may be, the court, if it is compelled to yield to circumstances"—that again I take to be a reference to the Act of 1800 in its context—"will carry the charitable intention into effect through the medium of some other scheme." That case seems to me to decide the question of principle which is here involved.

In the case of *In re Monk*,⁸ that case was clearly approved of by the Court of Appeal—indeed, I think it was more than

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approved. Up to a point it seems to me it was followed. The case of *In re Monk* ⁸ is a good deal less close to the present case than *Martin v. Margham*.⁹ Lord Hanworth treated the point in *Martin v. Margham* ⁹ as being the same point as that with which he was concerned in *In re Monk*,⁸ and Lawrence L.J., in his judgment, said ¹⁰: “In my opinion the destination “ of the surplus income after the period allowed by law for “ the accumulation of income depends primarily upon whether “ or not there is to be found in this will a general inten- “ tion to devote the residue to charity. It is not disputed that “ if there be such a general charitable intention any surplus “ income after the expiration of the period allowed by law will “ be applicable cy-près, and will not pass to the next-of-kin.”

In the present case there is a general intention to devote the residue to charity. This direction to accumulate is a purely administrative direction, void though it is. It is really an accumulation, the benefit of which was ultimately to enure to the Wesleyan Methodists.

Martin v. Margham ¹¹ is very near to this case, and it has stood since 1844. Therefore, although I had some doubt until I saw the case of *Martin v. Margham*,¹¹ I must decide that the next-of-kin and the heir-at-law are altogether excluded.

There is a somewhat difficult point of construction as between the two charities, but counsel for the Wesleyan Methodists and counsel for the Attorney-General have indicated that they feel they would have no difficulty in adjusting that situation by means of a scheme, and I agree with them and a scheme will have to be directed in any event. Accordingly, I will declare that the residuary estate and Granby Villa are held on valid and effectual trusts to the exclusion of the next-of-kin and heir-at-law, and I will direct a scheme.

Declaration accordingly.

Solicitors: *Jaques & Co., for Irons (W.) & Son, Sheffield;*
Treasury Solicitor.

J. L. D.

⁸ [1927] 2 Ch. 197.
⁹ 14 Sim. 230.

¹⁰ [1927] 2 Ch. 197, 215.
¹¹ 14 Sim. 230.

ALLIANCE BUILDING SOCIETY *v.* SHAVE AND OTHERS.WYNN-
PARRY J.

[1952 A. 261.]

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Apr. 1.

Practice and Procedure—Mortgage—Legal charge—Premises vacated by mortgagors—Tenant in occupation of part—Summons by mortgagor for possession—Mortgagor not served—No prejudice to mortgagors—Order against tenant for possession—Order for possession—Form of order—R.S.C., Ord. 55, r. 5a.

A legal charge contained an attornment clause whereby the mortgagors attorned tenant to the society at the yearly rent of a peppercorn if demanded. Also it provided that the society could determine the tenancy, at any time after the power of sale had become exercisable, after giving the mortgagors seven days' notice to quit, and that the statutory power of sale should be exercisable free from the restrictions imposed by section 103 of the Law of Property Act, 1925. The mortgagors defaulted, notice to quit was served on them and the attornment tenancy determined. The society issued a summons for possession under Ord. 55, r. 5a, the defendants being the mortgagors and a tenant of two rooms in the property. Both mortgagors had in fact vacated the property. The tenant was in occupation and was served, as also, ultimately, was one of the mortgagors but not the other. On the hearing of the summons the defendants did not appear and were not represented, and the society did not ask for an order against the mortgagors.

Held, that the court would make the order for possession against the tenant only, since to do so in the absence of the mortgagors could not possibly prejudice them.

Alliance Building Society v. Varma [1949] Ch. 724 followed.

Martins Bank Ltd. v. Kavanagh [1948] W.N. 321; 64 T.L.R. 485; [1948] 2 All E.R. 448 distinguished.

PROCEDURE SUMMONS.

This was a summons in an action by the Alliance Building Society for possession of property comprised in a legal charge dated October 22, 1948, and made between the first and second defendants (hereinafter called "the mortgagors") and the society, whereby the mortgagors charged the property by way of legal mortgage with payment to the society of £765 with interest repayable by monthly instalments of £4 2s. 3d. and other moneys therein mentioned. The charge contained an attornment clause whereby the mortgagors attorned tenant to the society at the yearly rent of a peppercorn if demanded and provided that the tenancy might be determined by the society at any time after the power of sale had become exercisable after giving the mortgagors at least seven days' notice to quit; and it

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expressly provided that the statutory power of sale should be exercisable free from the restrictions imposed by section 103 of the Law of Property Act, 1925.

Default having been made in repayment of the instalments due under the legal charge, notice to quit was served on the mortgagors and the attornment tenancy determined on November 22, 1951.

On January 24, 1952, the society issued an originating summons claiming possession of the property. The application was made under Order 55, r. 5A,¹ and the defendants were the mortgagors and a tenant of part of the property.

When the summons was issued it was believed that all three defendants were in possession but, on the process server attending to serve the summons, it was found that the mortgagors had both vacated the property, leaving the tenant in occupation of two rooms in it. After inquiries, one mortgagor was traced and served, but not the other.

The master would not make an order against the tenant only, in view of *Martins Bank Ltd. v. Kavanagh*,² in which it was held that the mortgagor, even though not in possession, was a necessary party. He agreed that, notwithstanding that decision, orders were being made in some Chancery chambers without service on the mortgagor; and he adjourned the summons for the society to consider adjourning it to the judge as a procedure summons.

It being desired to have the proper practice established, the summons now came before the court.

The defendants did not appear and were not represented.

Denys Buckley for the society. The court is asked to make an order for possession against the tenant only, or to decide that service on the mortgagor who has not been served is not necessary before that order can be made. True, *Roxburgh J.*, in *Martins Bank Ltd. v. Kavanagh*,² held that, under the existing practice of the Chancery Division, the trustee in bankruptcy of

¹ Ord. 55, r. 5A: "Any mortgagee . . . entitled to or having property subject to a legal mortgage or equitable charge . . . may take out as of course an originating summons . . . for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say

" . . . delivery of possession . . . to the mortgagee . . . by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in, possession of the property . . ."

² [1948] W.N. 321; 64 T.L.R. 485; [1948] 2 All E.R. 448.

a bankrupt mortgagor ought to be a defendant. There, as here, the application was made under Ord. 55, r. 5A, and Roxburgh J. held as he did on the ground that the form of order prescribed by Ord. 55, r. 8A (see *Annual Practice*, 1949, vol. 2, p. 2759) contemplated that the mortgagor would be a party, and on the ground that the application involved a step in the enforcement of the security which might prejudice the person entitled to the equity of redemption. In *Alliance Building Society v. Varma and Another*,³ however, Evershed M.R. held that the right order was that the second defendant, who neither was the mortgagor nor claimed to derive title under the mortgagor, should deliver up possession of the premises; and that no order was required against the mortgagor as he was not then in occupation of anything. That disposes of the ground of Roxburgh J.'s judgment based on the form of order under Ord. 55, r. 8A. As to the second ground, namely, of possible prejudice to the person entitled to the equity of redemption, the society, as has been indicated, does not now ask for an order against the mortgagors, and is content that they should be struck out, since any relief granted will not concern them. If the property was vacant, the society would be able to retake possession on the order which the court is now asked to make. The fact that the third defendant, the tenant, is in occupation, does not make necessary an order against the mortgagors. Roxburgh J.'s judgment does not preclude the court from making the fullest investigation in every case to discover whether the mortgagor will be prejudiced. Here, all the evidence indicates that neither mortgagor will be prejudiced. The court ought therefore to make the order for which the society asks and to refer the matter back to the master.

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WYNN-PARRY J. This summons comes before me because it has been found possible to serve only the first defendant and the last defendant. The second defendant, a co-mortgagor with the first, has not been found, and the case has been argued before me on the basis that an order for possession ought to be made even though the second defendant has not been served.

I confess at once that had the matter been free from authority I should, for myself, have found little difficulty in acceding to the application; but it becomes necessary to consider one or two authorities. The chief authority which appears to stand in the

³ [1949] Ch. 724.

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way of the plaintiff is *Martins Bank Ltd. v. Kavanagh*.⁴ In that case the defendant, in 1944, charged a farm by way of legal mortgage with the payment of certain moneys to the plaintiff bank. In 1947 she was adjudicated bankrupt, but she remained in occupation of the farm. The plaintiff bank issued an originating summons claiming possession of the farm and elected before the master not to add as a defendant the trustee in bankruptcy, in whom, of course, the equity of redemption was vested.

The matter came before Roxburgh J., who delivered a reserved judgment. He dealt with two points which had been raised before him. The first was a question of procedure, on which he held that the application was properly made by originating summons under Ord. 55, r. 5A. The second point was whether or not, on the basis that the application was properly made by summons, the trustee in bankruptcy should have been joined, and his lordship held that the trustee in bankruptcy should have been joined. He deals with that point in this passage in his judgment, after referring on the first point to *Temperance Permanent Benefit Building Society v. Nevitt*,⁵ by saying⁶: "The Court of Appeal, in the case to which I have already referred, held that there the mortgagor was a necessary party. The form of order prescribed by Ord. 55, r. 8A, contemplates that the mortgagor will be a party, but, furthermore, the application involves a step in the enforcement of the security which may prejudice the person entitled to the equity of redemption. I am satisfied, therefore, that he ought to be a defendant under the existing practice of the Chancery Division." It will be observed that Roxburgh J. rests his decision on two distinct grounds, the first being that the form of order prescribed by Ord. 55, r. 8A, contemplates that the mortgagor will be a party.

Since that case was decided there has come before the Court of Appeal *Alliance Building Society v. Varma and Another*.⁷ In that case a mortgagor, by a conveyance in September, 1945, acquired property which, by a mortgage of the same date, he charged to the plaintiff society with the payment of a secured sum by instalments. Before the date of the conveyance by which he acquired the property, the mortgagor had been permitted by the vendors to enter into possession of that property, and he agreed with the second defendant that she should go into

⁴ [1948] W.N. 321; 64 T.L.R. 485; [1948] 2 All E.R. 448.

⁵ [1940] 3 All E.R. 237.

⁶ 64 T.L.R. 485, 486; [1948] 2 All E.R. 448, 449.

⁷ [1949] Ch. 724.

possession as tenant at will. In 1948 the instalments had fallen into arrears and the plaintiff society took out an originating summons under Ord. 55, r. 5A, against the second defendant, claiming possession.

The Court of Appeal held that Ord. 55, r. 5A, gave the court power to make an order for delivery up of possession to the plaintiff against the second defendant, as being a person in possession of the property, even though she was neither the mortgagor nor a person claiming to derive title under him. It is perfectly true that the mortgagor was made a party. But in the course of his judgment Evershed M.R. said⁸: “. . . there only remains the question of the form of the order. I have stated that the second defendant is in possession, that is, in occupation of the mansion house. I think that the right order to make will be an order against the second defendant that she deliver up to the plaintiff possession of the premises described in the schedule to the summons or such part thereof as she now occupies. As to the first defendant, as he is not in occupation of anything, no order is required against him, and the proper order, therefore, appears to be that the court does not think fit to make any other order on the summons save to give to the plaintiffs the right to add their costs of the summons and of the appeal to this court to their security.” The effect of that judgment is that, notwithstanding the form of order prescribed by Ord. 55, r. 8A, an order for possession can be made against a stranger in title and no order need be made against the mortgagor. I therefore feel constrained to conclude that the first ground on which Roxburgh J. based his judgment no longer binds me.

There remains the second ground, namely, that the application involves a step in the enforcement of the security which may prejudice the person entitled to the equity of redemption. No doubt, if in any particular case it can be shown that such an application may prejudice the person entitled to the equity of redemption, the court would insist on that person being before it, and as the report, with regard to the facts, is not a full report, there may have been—indeed there must have been—some circumstances which to the mind of the learned judge pointed to the likelihood of such prejudice arising. I do not, on consideration, read the judgment of Roxburgh J. as preventing me in the case before me from inquiring whether or not any

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⁸ [1949] Ch. 724, 728.

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such prejudice can arise. In this case, by the terms of the legal mortgage, it is expressly provided that the statutory power of sale shall be exercisable free from the restrictions imposed by section 103 of the Law of Property Act, 1925. I have carefully considered whether in any respect, in the circumstances of the present case, it could be postulated that to make an order against this stranger to the title, in the absence of the mortgagors, could possibly prejudice them. In my judgment it is impossible to discover any such circumstance, and, therefore, I feel free to treat this case as distinguishable from *Martins Bank Ltd. v. Kavanagh*.⁹ For those reasons I propose to accede to the application and will make the order for possession. The time in which possession is to be delivered up will be 21 days.

Order accordingly.

Solicitors: *Boxall & Boxall, for Cardens, Brighton.*

K. R. A. H.

⁹ [1948] W.N. 321; 64 T.L.R. 485; [1948] 2 All E.R. 448.

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June 10,
11, 12, 16.

[1950, A. 3897.]

Market—Stallage—Charges not regulated by custom, charter or statute—Right of owner of soil to charge at discretion for stallage—Reasonableness—Statute of Westminster I, 1275 (3 Edw. 1, c. 31).

The corporation of Colchester were the owners of a market held every Saturday in the High Street, the soil of which they also owned. The market was of very ancient origin, being referred to as already existing in a charter granted by Richard I in 1189. At no time had the market charges been limited in any way by custom, charter, prescription, or specific enactment.

In 1945 the corporation adopted a new scale of charges for "stallage," a charge for the exclusive occupation of a fixed space in the market, which was payable to the corporation by virtue of their ownership of the soil, not of the market. In the new scale the charges to traders not resident within the borough or neighbourhood were very greatly increased, so that they were considerably in excess of the charges levied on such traders in comparable markets elsewhere. This course was adopted to exclude undesirable elements from the market.

In an action brought against the corporation on the relation of an organization of market traders, it was claimed that the charges for stallage were excessive and unreasonable; that the corporation were entitled by law to charge reasonable amounts only by way of stallage, and that the maximum reasonable amount was one shilling per foot of frontage (one-tenth of the sum then charged to outside traders). The corporation contended that they could make such charges for stallage as they thought fit, or alternatively as they thought fit in the interests of the burgesses; further, if they were precluded from charging more than reasonable amounts, then the existing charges were reasonable, or were reasonable having regard to the best interests of the burgesses:—

Held, that where the right to occupy a space in a market, and the stallage charges for such right, are not specifically regulated by custom, charter or otherwise, stallage charges are the subject of a free bargain made between the trader and the owner of the soil; and the owner can make what charges he pleases. The action accordingly failed.

The provisions of the Statute of Westminster I, 1275 (c. 31) do not apply to stallages in such a market, notwithstanding the observations of Lord Coke in 2 Inst. 220.

Mayor of Northampton v. Ward (1745) 2 Strange 1238, and *Rex v. Burdett* (1697) 1 Ld. Raym. 148 applied.

ACTION.

An action was brought by the Attorney-General at the relation of one Edgar Hunt, the general secretary of the National Market Traders' Federation, against the corporation of the borough of Colchester, who were the owners of a market held once a week on Saturdays in High Street, Colchester. The plaintiff claimed that the amounts demanded by the corporation for stallage, that is, for rent for the occupation of sites in High Street by stalls, were unreasonable, excessive and rank, and asked for declarations that they were only entitled to charge a reasonable amount for stallage; that 1s. per linear foot of frontage was a reasonable charge, and claimed an injunction to restrict the defendants to a reasonable charge.

The corporation alleged that they were the owners of the market and also of the soil of High Street, Colchester, on which the market was held and the stalls erected; and they contended that they were entitled to charge such amounts for stallage as they thought fit, or, alternatively, such amounts as they thought fit in the interests of the inhabitants of the borough.

They contended, alternatively, that if they were precluded by law from levying more than reasonable charges, then the charges levied were reasonable, or, alternatively, were reasonable having regard to the interests of the inhabitants of the borough.

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The ownership of the market by the corporation was very ancient. The first charter known was one of Richard I, dated December 6, 1189. This charter did not grant the market, but forbade the impeding of the market of Colchester by any extraneous market; it was evident, therefore, that the market had an earlier origin. In 1684 the corporation surrendered the market; and by a charter of Charles II, granted in the same year, received a regrant of their previous markets, fairs and other franchises and privileges.

The corporation claimed the right to hold the market on several days in the week, but it was now, and for many years past had been, held only on Saturdays, except for an extra day near Christmas. Payments by way of stallage had been received from traders for many years. The charges, which were for the right to erect a stall on a site in the market, as the corporation did not provide any stalls, were published from time to time, whenever an alteration was made in the amounts.

The maximum number of stalls permitted by the available space was about 50, the number depending on the length of frontage taken by individual stallholders. The depth of the stalls was limited by the corporation in the interests of traffic in the street, 4 feet 6 inches being allowed for the tables or similar structures, with a further space for the traders to move round their stalls or to attend to them. The charges at the material time were calculated according to the length of the frontage of the stall facing the foot pavement of the street.

From 1819 to 1837 the charge was 2d. irrespective of space, and was levied only on traders who did not reside in the borough. In 1837 there was a fresh schedule of charges, but the rate remained at 2d., and the charges were levied on non-residents only till 1922. In 1922 the charges were increased to 6d. for residents and 1s. for non-residents selling goods other than fish, and for sellers of fish the charges were double in each case.

In 1939 charges according to linear foot frontage of sites were introduced, and the charges were 4d. per foot for residents and 6d. per foot for non-residents. As from January 12, 1946, a new scale of charge was adopted, under which persons residing within the borough were to pay 1s. 3d. per linear foot, persons residing within an area of 10 miles from the borough 2s. 6d. per linear foot, and persons residing outside that area £1 per linear foot. On July 17, 1948, a requirement of a minimum charge of £4 for the last class was imposed. On July 19, 1949, as a result of

representations by members of the National Market Traders' Federation, the £1 charge was reduced (as from August 6, 1949) to 10s. per linear foot for the traders resident outside the 10-mile area; this was the charge in force in the case of such persons at the date of the action.

The imposition of the higher charges for traders from outside the borough and the 10-mile area was made by the corporation in 1945–1946 deliberately with the object of discouraging the taking of stalls by persons from London and other places outside Colchester, because the corporation considered that many of the persons who came from such places were not desirable as traders in the market and their presence in considerable numbers reduced the amount of space available for local traders such as those who brought in their produce from market gardens and the like.

The evidence showed that the charges to outside traders were very much higher than those levied in similar markets elsewhere. There was no evidence that the market charges had ever been specifically restricted by custom, charter, prescription or statutory enactment, as was the case in many other markets. No trader was called to give evidence as to any injury suffered by his trade on account of the present charges.

Hunter-Brown for the plaintiff. It is the plaintiff's contention that the maximum charge which the defendants can make in law for stallage must be reasonable. Having fixed a reasonable maximum charge, they may reduce it for the benefit of local residents. What they cannot do is to fix a charge for local residents which may be reasonable and then increase the charge for non-residents to such a degree that they are virtually excluded from the market.

The law on the question is set out in Pease and Chitty on the Law Relating to Markets and Fairs (1899), at pp. 4–5, 31, 55, 59, 63–4 and 66–7; the following propositions emerge: (a) All members of the public have the right of entering the market in order to expose their wares for sale, or to make purchases; (b) no trader has of common right the right to erect a stall, or to occupy exclusively a portion of the soil; if a trader does so, the owner of the soil may either (i) expel him by force, or (ii) sue him in trespass, or (iii) waive the tort, and sue him in assumpsit, in which case the court will award a reasonable amount by way of damages; (c) it was laid down by the Statute of Westminster I

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(c. 31),¹ and other authorities, that tolls and charges must be reasonable in amount; (d) in many authorities "toll" is used in a wide and loose sense, as including market charges, such as stallage, other than toll proper, i.e., a charge levied on the sale of goods; and (e) to make an unreasonable charge for stallage is indictable. [*Austin v. Whittred*,² *Mayor of Northampton v. Ward*,³ *Mayor of Great Yarmouth v. Groom*,⁴ *Lockwood v. Wood*,⁵ *Duke of Bedford v. Emmet*,⁶ *Hungerford Market Co. v. City Steamboat Co. Ltd.*,⁷ *Duke of Newcastle v. Worksop U.D.C.*,⁸ and *Stamford Corporation v. Pawlett*⁹ were referred to.]

Lord Coke, in his commentary (2 Inst. 220) on the Statute of Westminster I, indicates clearly that "outrageous toll," at which the statute is aimed, is a wide expression including stallage.

Assuming that the defendants are to be limited to reasonable charges only, it is perhaps not easy to formulate what the tests of reasonableness should be, and there appears to be no authority on the matter. The amount which a trader might be willing to pay cannot be a test; that would be to deny the premise that the charge must be reasonable. It is submitted that the court should as nearly as possible quantify the money value of the day's occupation of the site, and that regard should be had to the budget of the stallholder—to his daily takings, outgoings and profit. It is material also to consider the charges levied elsewhere in comparable markets. The 10s. charge levied by the defendants is extortionate. They are making much more profit than was suggested as reasonable by Hamilton L.J. in *Attorney-General v. Horner* (No. 2).¹⁰ That case shows also that if the defendants are making improper charges, the appropriate relief is

¹ Statute of Westminster I, 1275 (3 Edw. 1, c. 31): "Touching them that take outrageous toll, contrary to the common custom of the realm, in market towns: it is provided, that if they do so in the King's town which is let in fee farm, the King shall seize into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the King shall do in like manner, and if it be done by a bailiff or any mean officer, without the commandment of his lord, he shall restore to

the plaintiff as much more for the outrageous taking as he had of him, if he carried away his toll, and shall have forty days' imprisonment."

² (1746) Willes 623.

³ (1745) 2 Strange 1238.

⁴ (1862) 1 H. & C. 102.

⁵ (1841) 6 Q.B. 31.

⁶ (1820) 3 B. & Ald. 366.

⁷ (1860) 3 E. & E. 365.

⁸ [1902] 2 Ch. 145.

⁹ (1830) 1 Cr. & J. 57.

¹⁰ [1913] 2 Ch. 140, 198.

by declaration and injunction. [*Bryant v. Foot*¹¹ was also referred to.]

Sir Andrew Clark Q.C. and *J. L. Arnold* for the defendants. The right to charge for stallage arises by virtue of the ownership of the soil; unlike the right to charge for toll proper, it requires no franchise, grant or prescription to support it.

Rights to charge for stallage may be divided into two classes: class (a), where (as at Colchester) the landlord's right is unfettered by any custom, prescription, franchise or statutory enactment, and class (b), where the right is so fettered in one way or another.

There is an essential difference between the rights of a market owner, in respect of tolls, and of a landlord, in respect of stallages, in a market of class (a). The market owner owes a duty to the public, to permit persons to come and go freely in the market to buy and sell. If he makes such extortionate charges for toll that the public right to trade freely is prejudiced or impeded, then he violates that public right; that is the offence at which the Statute of Westminster I is aimed.

The landowner of a class (a) market is in quite a different position. No member of the public has any right to set up a stall or to occupy a fixed place in the market; his right is to perambulate the market with his wares in a basket, or on a tray. The landowner may prohibit stalls altogether; he may by express contract permit their erection on such terms as he thinks fit (as at Colchester). If he stands by, and permits a stall to be erected without an express bargain, he may be deemed voluntarily to waive the trespass, and may recover in *assumpsit* a reasonable sum, on the basis of an implied contract. That is the only way in which he can be restricted to a reasonable charge for stallage. At Colchester the position is, that the charges are publicly exhibited and known beforehand by the traders; if they take a stall, the question is one of express contract, and the question of reasonableness does not arise. There is only one duty which the landowner owes to the public: he may not fill up the market space with stalls to such an extent as to exclude the ambulatory sellers and buyers from their common law rights: *Rex v. Burdett*.¹²

In the class (b) market, the landowner's right has been restricted by prescription, or custom, or franchise or some

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¹¹ (1868) L.R. 3 Q.B. 497.

¹² (1697) 1 Ld.Raym. 148.

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enactment: in such a case the public, or some class of persons, have a right to erect stalls, and the charge which may be made may be customary, or prescribed, or reasonable. The landowner is under a duty to permit the erection of stalls, and to charge excessively would be to fail in that duty. He is in just the same position as the market owner with regard to tolls proper.

Turning to the cases: *Mayor of Norwich v. Swann*¹³ and *Mayor of Northampton v. Ward*¹⁴ show that there is no right in the public to erect a stall: a stallholder must make a bargain with the landowner. *Rex v. Burdett*¹⁵ shows that anyone wishing to enjoy the convenience of a stall must comply with the landowner's terms. *Brackenborough v. Spalding U.D.C.*¹⁶ shows that a market owner is under no obligation to erect or allow the erection of stalls.

Of the cases cited for the plaintiff, in *Mayor of Great Yarmouth v. Groom*¹⁷ there were customary rights, and the case merely decides that it is a trespass to use a basket as a stall. The *Newport* case¹⁸ merely overrules the dictum in the *Northampton* case¹⁹ that assumpsit will not lie. The *Duke of Bedford*²⁰ and *Hungerford Market*²¹ cases are not applicable here, as there were statutory limitations. The observations of Farwell J. in the *Workshop* case²² were obiter, and cannot refer to stallage in a class (a) market.

The Statute of Westminster I, *pace* Lord Coke, cannot apply: where the public have no right to a stall, there can be no extortion; the public are not forced to pay stallage, or to forfeit a legal right for not paying it. If the Statute applies to more than toll in the strict sense, as Lord Coke may have thought, it can apply to stallages only in markets of the (b) type, where rights to a stall and charges for stallage are regulated by custom or some other manner; and Pease and Chitty are in error when they state that charges for stallages must in all cases be reasonable. Another text writer, Gunning, in his *Practical Treatise on the Law of Tolls* (1833), supports the defendants' contentions: see pp. 44, 61 and 89.

If it is necessary to consider what a reasonable charge ought to be, it is submitted that the tests should be: (a) is the market flourishing and well patronized, so avoiding the mischief referred

¹³ (1777) 2 Wm.Bl. 1115.

¹⁴ 2 Strange 1238.

¹⁵ 1 Ld.Raym. 148.

¹⁶ [1942] A.C. 310.

¹⁷ 1 H. & C. 102.

¹⁸ (1832) 3 B. & Ad. 411.

¹⁹ 2 Strange 1238.

²⁰ 3 B. & Ald. 366.

²¹ 3 E. & E. 365.

²² [1902] 2 Ch. 145, 161.

to in the Statute of Westminster I, and (b) how do the charges compare with the turnover of the stallholders and their trading profits? It is of little use making comparisons with the past, in view of the diminished value of money: but even so, some of the old cases show that charges for stallage in the past have been very high, when the contemporary value of money is taken into account. Thus *Lawrence v. Hitch*²³ shows that 2s. 6d. was charged for stallage in 1786, and *Lockwood v. Wood*²⁴ shows that 1s. was reasonable about 1700. Not one trader has been called to support by evidence the allegation of unreasonableness.

Hunter-Brown in reply.

Cur. adv. vult.

DANCKWERTS J., reading his judgment, after stating the facts, continued:—This action raises an extremely interesting question on which there is very little definite authority, namely, whether sums required by an owner of a market to be paid for the exclusive occupation of stalls in the market, by virtue of his ownership of the soil on which the market is held, must be limited to reasonable amounts. Two points must be mentioned at once in this connexion. First, there is some obscurity on the question whether the corporation owned the soil of High Street otherwise than merely as highway authority; their title is put forward as remaining vested in them by virtue of section 32 of the Local Government Act, 1929; but, if their ownership now is simply as highway authority, no argument against them has been based on this point. Secondly, there is no allegation that the site of the market is so covered by stalls that sufficient space is not left for sellers of goods to dispose of their goods in the ancient manner customary in markets without the necessity of stalls; consequently, the case has proceeded on the footing that the corporation have not compelled the market traders to take stalls, and it must be assumed that traders who take sites for stalls do so voluntarily.

The relator is general secretary of the National Market Traders' Federation. The action is by Her Majesty's Attorney-General and not in any sense a representative action on behalf of the members of the Federation. But it is evident that the interest of the relator is concerned solely with market traders who come from outside the borough of Colchester. Mr. Hunt (the relator) alleged in his evidence that only outside traders who dealt in

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²³ L.R. 3 Q.B. 521.

²⁴ 6 Q.B. 31.

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lucrative lines such as dress materials or dresses could make a reasonable profit after paying the present charges for stalls, and that the market was not now a well-balanced market because the rates excluded outside traders who dealt in small manufactured commodities such as reels of cotton and toys (whom he termed "the ordinary market trader"). It appeared, however, that when he visited the market in May, 1951, there were some residents within the borough or the 10-mile area who were selling such articles.

A market is the right to hold a concourse of persons for the purpose of buying and selling, and it confers a monopoly on the owner because the setting up of a competing market can be prevented or stopped by an action for disturbance. There are modern statutory markets, but the ancient markets are generally created by Royal Charter and are franchises. A fair is merely a greater sort of market held usually on less frequent days. Tolls are not incident of common right to a fair or market. Accordingly, there must be found some subsidiary grant of the right to take tolls by express mention. The amount of the tolls need not be specified in the grant, and, in the absence of specific mention of an amount, the right will be to take tolls of a reasonable amount. The right to take tolls may be established by prescription.

At common law, tolls for goods sold in a fair or market are due from the buyers and not from the sellers; but the difficulty of collecting such tolls must be considerable. It is not surprising that attempts have been made from time to time to establish a right to take tolls from the sellers. In some cases such attempts have been successful; in other cases they have been unsuccessful: see *Attorney-General v. Horner* (No. 2).²⁵

Payments known as stallages or pickages are of a different nature from the franchise or market tolls which were exacted from buyers or, if custom supported the practice, from sellers, and which were only payable in respect of goods actually bought and sold in the market. The common law right of the public was to come into the market or fair to buy and sell goods, and the public had no right to erect stalls or to place their goods upon the ground in the market except for a purely temporary purpose. If a seller attempted to appropriate a portion of the ground to his exclusive occupation, he committed a trespass and could be sued by the owner of the soil, unless he obtained the owner's consent and agreed with him on the payment to be made to him for the

²⁵ [1913] 2 Ch. 140.

privilege or convenience of erecting a stall. This payment was called a "stallage" and, if holes were made in the soil for poles or posts, it was called a "pickage." But it was established that, if a trader erected his stall without previous agreement with the owner of the soil, the owner of the soil might waive the tort and sue in assumpsit upon an implied contract: see *Mayor of Newport v. Saunders*.²⁶ But in that case the owner of the soil could only recover the amount fixed by custom if there was such a sum, or a reasonable payment if there was no fixed sum.

It is settled beyond doubt that the owner of the market or of the soil was under no obligation to provide any stalls or pens or other such conveniences; his duty at common law was limited to providing a space in which buyers and sellers could meet and conduct their trading: see *Brackenborough v. Spalding Urban District Council*,²⁷ in which the House of Lords exonerated a market authority from liability to the widow of a man killed by a steer that escaped from a pen, on the ground that the provision of pens was not a duty of the owner of a market. Conversely, the owner of a market owes a duty not to prevent the public exercising their common law rights of resorting freely to the market, and so is liable if he so covers the site of the market with stalls that insufficient room is left for the market to be enjoyed by those who do not wish to take stalls: *Rex v. Burdett*.²⁸

In essence, therefore, the right to stallage payments is different from the right to take ordinary tolls from buyers of goods, being not dependent upon any royal grant (or prescription amounting to the same) but created *ratione terrae* or by virtue of ownership of the soil (including the possession or occupation of a lessee). Stallages may, however, be based upon custom, because there may be a custom in the inhabitants of a place, or a particular class of such inhabitants, to erect and occupy stalls in a market or fair, paying a reasonable sum as stallage, or some sum fixed by custom, as the case may be.

The matter is also complicated by the Statute of Westminster 1 (3 Edw. 1, c. 31) of 1275. According to Lord Coke (2 Inst. 220): "In the troublesome and irregular raigne of Henry III outrageous" "tols were taken and usurped in cities, boroughs, towns, where" "fares and markets were kept, to the great oppression of the" "King's subjects, by reason whereof very many did refraine from" "the comming to faires and markets, to the hindrance of the" "commonwealth; for it hath ever been the policy and wisdome

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²⁶ 3 B. & Ad. 411.

²⁷ [1942] A.C. 310.

²⁸ 1 Ld.Raym. 148.

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“ of this realm that faires and markets and specially the markets,
“ be well furnished and frequented.”

[His Lordship read the statute and proceeded:] The provisions of this statute are relied upon by the relator, and it is said that “ toll ” in the statute includes every kind of toll, including stallage. As has been indicated, the title to receive stallage is essentially different from that to franchise tolls, and it has been said that the term “ toll ” strictly does not include “ stallage ”: *Mayor of Northampton v. Ward*.²⁹ On the other hand, it may be interpreted to include stallage in Acts of Parliament, grants and pleadings: *Bennington v. Taylor*³⁰; *Duke of Bedford v. Emmett*³¹; *Lockwood v. Wood*.³²

Lord Coke continues, in the passage to which I have referred, as follows: “ Toll. For the generality of the word, see Jehu “ Web’s case, lib. 8 Magna Charta, and W.2. whereof, and of “ the severall kinds thereof, more shall be said in the exposition “ of the Statute of W.2. for that here it is restrained, as hereafter “ appeareth. Outragious. That is, either where a reasonable “ toll is due, and excessive toll is taken, or where no toll at all “ is due, and yet toll is unjustly usurped, for it is an outrage to “ doe such a common injury and wrong; sometime it is called “ superfluum, vel indebitum, vel injustum. No toll is due either “ on the part of the lord, when he hath a faire or market, and “ not any toll; or on the part of the market man, who ought to “ be discharged of toll, or of the thing sold that is not tollable. “ En la ville merchandie. That is, a city, borough, or town “ of merchandize, where faires and open markets are kept, for “ merchandizing, and buying and selling. This is intended of “ toll to the faire or market, whereof we will only speak in this “ place. Toll to the faire or market is a reasonable summe of “ money due to the owner of the faire or market, upon sale of “ things tollable within the faire or market, or for stallage, picage “ or the like ”; and that is the end of the quotation.

I have quoted the passage from Lord Coke in full because on behalf of the relator it is contended (1) that Lord Coke said that the Statute of Westminster I applies to tolls of every kind (including stallage), and (2) that he said that stallage must be reasonable in amount equally with franchise tolls, that is, tolls demandable on the purchase of goods. On behalf of the defendant corporation it was contended that the words used by Lord

²⁹ 2 Strange 1238.

³⁰ (1700) 2 Lut. 642.

³¹ 3 B. & Ald. 366, 371.

³² 6 Q.B. 31.

Coke were limited to tolls which were payable by grant, custom or implied contract, and had no reference to a case where an express contract was made between the owner of the soil and the stallholder.

In Pease and Chitty's *The Law relating to Markets and Fairs* (1899) it is said at p. 64: "The amount due for stallage may be a matter of express or implied agreement; but must in all cases be reasonable; and a market owner who extorts an unreasonable stallage by compelling to take stalls and running up their price may be indictable for so doing." The authority quoted for the first of those statements is the Statute of Westminster I. For the second statement, *Rex v. Burdett*³³ and Russell on Crimes, pp. 425-428, are cited. This seems to be a misstatement of the effect of *Rex v. Burdett*,³³ in which the question of a reasonable amount does not appear to have been discussed.

Another passage in Pease and Chitty's book, at p. 67, was relied upon on behalf of the relator. The authors are enumerating the facts usually to be proved in an action for stallage or pikeage, and these include an allegation that "the sum claimed is a reasonable sum, and if it be claimed by special agreement or by custom or prescription, that the agreement was made, or the custom or prescription exists." But the opening words of the section, on p. 66, refer to toll or stallage being recoverable by action without proof of a special contract.

In *Lockwood v. Wood*,³⁴ in which the question to be decided was whether a modern grant created an exemption from stallage, Lord Denman C.J. quoted with approval the passage from Lord Coke on the subject of outrageous tolls and said that it had received judicial confirmation in the case of *Bennington v. Taylor*,³⁵ and decided that exemption from toll in the document in question would include exemption from stallage. In *Bennington v. Taylor*,³⁵ it is important to note, the amount of the stallage seems to have been fixed by immemorial custom, and the question was whether distress could be made for it.

In *Duke of Newcastle v. Worksop Urban District Council*³⁶ the question was whether increased tolls charged on fair days to persons who were not regular attendants on market days could be claimed by the lord of the manor who had granted a lease of the markets but had reserved the fairs. It was contended that these increased tolls must be fair tolls because they were an

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³³ 1 Ld. Raym. 148.

³⁴ 6 Q.B. 31.

³⁵ 2 Lut. 642.

³⁶ [1902] 2 Ch. 145.

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addition to the market tolls, but it was held that these increased payments (which were charged for stalls) were stallage payable to the lessees as owners of the soil. Farwell J. (that is Sir George Farwell) said ³⁷: "So long as the lord does not exceed the maximum toll that he is entitled to demand (that is, a reasonable amount when the charter specifies no sum: *Stamford Corporation v. Pawlett* ³⁸; and it is not suggested that 3d. is unreasonable), he may remit all or a part of the toll to whomsoever he pleases. The reasoning in the case of *Hungerford Market Co. v. City Steamboat Co.*³⁹ applies, in my opinion, to the present case." It is plain that in this passage Farwell J. was talking about stallage. *Hungerford Market Co. v. City Steamboat Co.*⁴⁰ was a case of statutory charges for the use of a wharf and a bridge and a statutory maximum was imposed, and less than the maximum was charged in certain cases. *Stamford Corporation v. Pawlett* ⁴¹ was not a case about stallage; it was the case of a grant of a market, with an express grant of toll, which, of course, implies a reasonable toll (as has been mentioned already).

The statements which I have now reviewed are certainly capable of being construed as imposing a reasonable limit on every kind of toll, connected with a market, including stallages recoverable *ratione terrae*, as the result of express contract. There are, however, statements contained in other legal works and cases which seem to be inconsistent with such a limitation in the case of stallages agreed with an owner of the soil of a market who does not attempt to force the trader to take a stall.

In *Mayor of Northampton v. Ward*,⁴² which was an action of trespass against a butcher who claimed the right to erect a stall in a market owned by a plaintiff who was seised in fee of the close, the court said that a person resorting to the market had no right at common law to erect a stall and must acquire the right by a compensation to the owner of the soil called stallage. And the court quoted with approval a passage in Spelman's Glossary which says that the stallagiator (that is, the stallholder) must make an agreement for compensation with the owner of the soil.

Rex v. Burdett ⁴³ was the case of an information against a farmer for extortion because he had taken sums of money from "the market people" for the use of the little stalls in the market. The common-law offence of extortion is apparently (as

³⁷ [1902] 2 Ch. 145, 161.³⁸ 1 Cr. & J. 57.³⁹ 3 E. & E. 365.⁴⁰ *Ibid.*⁴¹ 3 E. & E. 365.⁴² 2 Strange 1238.⁴³ 1 Ld. Raym. 148.

distinguishable from demanding money by menaces) the taking by a public officer of money from an improper motive and under colour of office, when the money is not due at the time it is taken. It was contended that the farmer's conduct was extortion, because the people had not free liberty to sell their wares in the market according to law. It was said by the court that if the defendant erects several stalls, and does not leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the defendant, the taking of money for the use of the stalls in such case is extortion. But if the people have room enough clear to themselves, to come and sell their wares, but for their further convenience they voluntarily hire these stalls of the defendant, without any necessity compelling them, then there is no extortion, though the defendant takes a fine and rent for the use of them. And it is said that if they will enjoy the convenience of the stalls, they must comply with the defendant's terms. The report continues: "Therefore this case rather resembles the case of new mills, where the miller is not restrained to any certain toll; but the persons who will have their corn ground there, must comply with the miller's demands; and whatever he takes, it is not extortion, because it is the voluntary agreement of the parties." This seems quite inconsistent with a limit on such charges by reference to what is reasonable.

In a book entitled *A Practical Treatise on the Law of Tolls*, by Frederic Gunning, published in 1833, the same view of the law relating to stallage seems to be taken. On p. 89 it is said: "As to the amount to which the owner of a fair or market is entitled for stallage or pickage, there are very few authorities. In one of the old books, 2 Shower 266, it is said that stallage must be certain: but in the *Northampton* case⁴⁴ the court said that if no particular sum is fixed by the custom of the market to be paid for the privilege of having a stall there, the person placing one must agree with the owner for the sum to be paid; and if any sum be fixed by the custom of the market, that alone can be demanded and must be paid." I was referred to a number of other interesting authorities, but the ones which I have mentioned seem to me to be the only ones which really bear on the point which I have to decide.

Now, I have to choose between these statements of the law,

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⁴⁴ 2 Strange 1238.

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unless there is some explanation which will make them reconcilable. Such an explanation has been put forward by Sir Andrew Clark on behalf of the defendant corporation. He contended that a distinction should be made between the case where the owner of the soil of a market obtains payments from those who wish for their own convenience to obtain exclusive occupation of the site of a stall, and the case where the payment to be made for a stall is not ascertained by a voluntary bargain between the parties, but either is settled by custom or an Act of Parliament, or without some express terms being agreed is to be implied from the stallholder taking the site of the stall by merely occupying it, so that an action in assumpsit would be upon an implied contract.

It is clear that there is plenty of room for confusion in these matters. For apart from the cases where the erection of stalls and payments to the owner of the soil over a long period have given rise to the inference of a custom, there are so many cases where a maximum or limit on the charges to be made has been imposed by some special Act of Parliament or is regulated by some general Act of Parliament or orders made under an Act of that kind. And the existence of a requirement of a reasonable limit in the case of franchise or market tolls and the passing of the Statute of Westminster I might well lead to misleading inferences. It is more easily understandable that a condition of reasonableness should be applied to cases where by virtue of the existence of a monopoly the trader has no choice but to pay franchise or market tolls, or tolls can be demanded without question by virtue of some custom, where again the trader could not avoid the payment. In such cases it may well have been desirable to provide more effective remedies "to prevent extortion" (or the extraction of outrageous tolls) by the Statute of Westminster I. But where the trader is under no obligation to incur the charges except for his greater convenience, as in the case of the voluntary taking of a stall by bargain with the owner of the soil, the same considerations do not apply. The case resembles, as was said in *Rex v. Burdett*,⁴⁵ that of "new mills, where the miller is not restrained by any certain toll; but the persons who will have their corn ground there, must comply with the miller's demands."

This explanation, therefore, of the apparent conflict of the authorities appeals to me and appears to me to have the merit of logic. The statements of Lord Coke are not wholly free from

⁴⁵ 1 Ld. Raym. 148.

inconsistency, as it seems to me, if they are read in the extreme sense attributed to them by the contentions on behalf of the relator, and I think that they have been taken to be more general than they were intended to be, so as to be misleading. In the same way, the general statement in Pease and Chitty's book that the amount due for stallage "must in all cases be reasonable," in my view, requires qualification, and may be due to a misapplication of the statements by Lord Coke.

The obiter dictum of Farwell J. in *Duke of Newcastle v. Workson Urban District Council* ⁴⁶ is easily understandable, as a general statement not wholly accurate in all conditions; as the cases to which he refers for support are not those of stallage demanded *ratione terrae*.

My conclusion is, therefore, that in cases where an agreement for stallage is reached between the owner of the soil and the stallholder at rates previously agreed, without unlawful compulsion by the exclusion of any site for common law market activities, it is a voluntary bargain which cannot be attacked by reason of the amount of the stallage charge so made payable. It is plain that in the present case the necessary conditions must be accepted as being operative. The charges payable to the corporation were announced beforehand and were well-known to those who elected to occupy stalls, and there is no evidence that sufficient space was not available to any trader who wished to exercise his common law rights for the purpose of selling his goods in the market.

This result makes it unnecessary for me to decide the question whether the charges required by the corporation to be paid were in fact unreasonable. I thought it right that the parties should put in the evidence that they had available on this question, in case this action should go further, and it might be necessary for the court to go into the matter. It was accepted by counsel for the relator that the onus was on the relator to prove that the charges were unreasonable, though it was contended that the onus could be shifted to the corporation by evidence in regard to the profits made by the corporation from the letting of the stalls. An agreed document was put in showing the charges made by a number of market owners in other well-known towns, in some of which a maximum was limited under some statute or order, and in which in quite a number of instances the market owner provided the stalls or stalls and cover for them. These comparisons

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⁴⁶ [1902] 2 Ch. 145, 161.

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indicated that, if the charge of 10s. per linear foot frontage made by the defendant corporation in the case of traders from outside the borough and ten-mile limit be taken into consideration, the charges made by the defendant corporation in the case of traders from outside the borough were very much greater than those made by the market owners referred to in the document. Further, the evidence showed that, while the total annual expenditure of the corporation in connexion with the market was estimated to be between £150 and £200, very much larger sums were taken by the collection of the stallage charges from the stallholders. For instance, in the year 1950-1951, the corporation received £3,574 13s. 9d., of which £2,419 10s. came from traders outside the borough and the ten-mile limit, and £1,155 3s. 9d. came from those within those limits. It is no doubt true that large profits are made which enure for the benefit of inhabitants of the borough who are ratepayers.

As I have already mentioned, the relator suggested in his evidence that the 10s. per foot charge made it impossible for outside traders, other than those operating in lines in which a high profit is obtained, to make a profit. But no trader was called to substantiate Mr. Hunt's allegations (which appears not to be first-hand) and to prove that by reason of the charges the trader was unable to make a reasonable profit. Nor was there any evidence whatever from any member of the public frequenting the market as a buyer to substantiate Mr. Hunt's allegations that the discouragement of what he called "the "ordinary market trader" from outside the borough rendered the market "ill-balanced," which, I suppose, means not equipped to meet the demands of the public. There is really no evidence whatever that the market does not provide the services or facilities which a local market is intended to provide for the local population. It may be inferred, perhaps, that the real grievance of the relator is that the class of trader which supports his Federation is not able to make in Colchester the profits to which such persons had become accustomed in an earlier period. I have, indeed, felt some difficulty in appreciating the considerations which really ought to decide whether stallage charges are reasonable. Both parties cited in aid the observations of Hamilton L.J. in *Attorney-General v. Horner* (No. 2),⁴⁷ in which he says: "The justification for the grant of a monopoly of market "is that the existence of the market is for the benefit of the

⁴⁷ [1913] 2 Ch. 140, 198.

"public. If the market keeper is not to get his outlay back and "something more, he will give up the market, and where will the "public be then?" Hamilton L.J. was, of course, in that case referring to the franchise or market tolls.

No doubt the corporation in the present case recovers the amount of the expenses required to maintain the market several times over. But no one has come forward to complain from the general body of the public who frequent the market to purchase goods. It is not suggested that the charges made to local traders are unreasonable. What sort of duty does the corporation owe to traders who come from London to make profits at the expense of the local inhabitants of Colchester? All I will say is that I am not satisfied that in the circumstances of the case the charges made by the corporation are unreasonable.

Accordingly, the action fails and must be dismissed with costs.

Action dismissed.

Solicitors: *Beveridge & Co., for Neal, Scorah, Siddons & Co., Sheffield; Sharpe, Pritchard & Co., for N. Catchpole, Town Clerk, Colchester.*

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[1951 K. No. 797.]

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Revenue—Estate duty—Incidence—Compound settlement—Portions charged by testator on reversionary interest—Additional portions charged under power in second trust instrument—Portions chargeable rateably with estate duty exigible on death of tenant for life—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (1).

EVERSHED M.R.,
BIRKETT and
ROMER L.JJ.

Power of Appointment—Excessive exercise—Effect.

The original testator, who died in 1870, devised substantial freehold estates to the use of his brother Walter for life, with remainder to the use of Walter's son Colonel Sneyd for life, with remainder to his sons in tail, with remainder to the use of Walter, his heirs and assigns, for ever. Walter died on July 2, 1888, having by his will devised the settled estates to his trustees for a term of 1,500 years upon trust to raise sums of £20,000 each, together with interest, as portions for his four daughters. Subject to that term, Walter devised the settled estates to the use of Major Henry Sneyd for life, with remainder to the appellant, Major Henry Sneyd's

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sons in tail. He empowered a tenant for life of the settled estates, either before or after he became entitled in possession, to charge the same "with the payment of any sum or sums not exceeding in "the different events hereinafter specified the different sums herein- "after mentioned as and for the portions of his or her child or "children—that is to say . . . in the case of four or more children "the sum of £25,000."

Colonel Sneyd died without issue in 1949. He was survived by his widow, who was entitled to a jointure rentcharge charged on the settled estates, and Major Henry Sneyd, who became tenant for life. Major Henry Sneyd by deed poll, executed in 1931, appointed that the settled estates should be held upon trust that after his death the trustees should "raise the sum of £15,000 clear "of all death duties (or such less sum as shall be the maximum "principal sum chargeable by the appointor under the power now "being exercised) with interest thereon at the rate of 4 per cent. in "trust for each of the daughters as shall be objects of the "power. . . ."

Major Henry Sneyd died in 1950 and thereupon the estates vested beneficially in the appellant, his infant son, as tenant in tail, subject to two joint rentcharges and to the portions charged by Walter's will and by the deed of 1931.

The trustees took out a summons to have it determined whether the portions given to the daughters of Walter, and the portions appointed by the deed of 1931 to the daughters of Major Henry Sneyd, ought both to bear a rateable part of the estate duty payable on the death of Colonel Sneyd in respect of the settled estates.

Roxburgh J. held that the portions ought not to bear any part of the estate duty. The infant tenant in tail appealed on that point.

A second question raised was whether, on the death of Major Henry Sneyd, the sum appointed by the deed of 1931 for portions ought to be charged with a rateable part of the estate duty payable on his death, and, if the portions were so chargeable, whether the gross aggregate amount was £15,000 or £25,000 or some other and what sum. Roxburgh J. held that the gross aggregate sum which could be raised was £25,000 and the portions must bear their own duty to the extent that the sum raised must not exceed that sum. Major Henry Sneyd's daughters cross-appealed on that point.

On appeal:—

Held, (1) that on the death of Colonel Sneyd the conditions for the application of section 14 (1) of the Finance Act, 1894, were satisfied and a rateable part of the estate duty then payable which was attributable to the portions payable for the four daughters of Walter must be borne by them. (2) That there was no distinction between the position of the daughters of Walter who took portions directly under his will and that of the daughters of Major Henry Sneyd, to whom portions were payable under the appointment of 1931, made in exercise of the power conferred by Walter's will, and that section 14 (1) applied in this case also. Accordingly, the portioners under the appointment of 1931 were liable to bear a

rateable proportion of the estate duty payable on Colonel Sneyd's death. (3) That the portioners under the appointment of 1931 were liable to bear a rateable proportion of the estate duty payable on the death of Major Henry Sneyd. (4) That on the true construction of the appointment of 1931, the first appointment of £15,000 clear of all death duties was an excessive appointment, and the sum raisable thereunder was the sum of £25,000 subject to its proportion of estate duty.

In re Smith-Bosanquet [1940] Ch. 954 and *In re Sebright* [1944] Ch. 287 considered and distinguished.

Decision of Roxburgh J. [1952] W.N. 23, as to the incidence of the estate duty reversed, and on the question of the construction of the deed of 1931 affirmed.

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APPEAL from Roxburgh J.¹

Ralph Sneyd the elder (hereinafter called "the testator"), by his will dated May 30, 1865, devised the Sneyd family settled estates in Staffordshire, known as the Keele Estates, to the use of his brother, the Reverend Walter Sneyd (hereinafter called "Walter") for life, with remainder to the use of Ralph Sneyd the younger (hereinafter called "Colonel Sneyd") for life, with limitations after his death to Colonel Sneyd's sons in tail, which failed, with an ultimate limitation to Walter, his heirs and assigns for ever. The testator thereby empowered Colonel Sneyd to appoint a jointure rentcharge of £1,800 payable out of the settled estates to any woman he might marry. The testator died on July 27, 1870.

Walter, by his will dated June 14, 1886, provided that in case he should become entitled in fee simple to the estates devised to him by the testator, he devised such estates to his trustees for a term of 1,500 years and subject thereto, in the events which happened, to Henry Ralph Mowbray Howard, who subsequently took the name of Sneyd, (hereinafter called "Major Henry Sneyd"), during his life, with remainder to the use of the first and other sons in tail of Major Henry Sneyd, with remainders over, and Walter directed his trustees to hold the term of 1,500 years upon trust to raise as portions for each of his daughters, other than an eldest daughter, the sum of £20,000 together with interest, and he directed his trustees to retain such portions upon the trusts thereafter declared.

Walter further provided by his will that every person thereby made tenant for life of the settled property should have power to appoint to any husband or wife for life the yearly sum of £1,500 to be charged on the estates, and he further declared that "It

¹ [1952] W.N. 23.

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“ shall be lawful for every person hereby made tenant for life of
“ the said premises hereinbefore devised in settlement, either
“ before or after he or she shall under this my will become
“ entitled to the possession or to the receipt of the rents and
“ profits of the said premises by any deed or deeds with or
“ without power of revocation and new appointment or by will
“ or codicil (but subject and without prejudice to the uses and
“ estates preceding the estate of the person for the time being
“ exercising this present power and to the powers annexed to
“ such preceding uses or estates and to the uses or estates
“ limited in exercise of such powers) to charge all or any of the
“ said premises hereinbefore devised in settlement with the pay-
“ ment of any sum or sums not exceeding in the different events
“ hereinafter specified the different sums hereinafter mentioned
“ as and for the portion or portions of his or her child or children
“ or any one or more exclusively of the other or others of his or
“ her children (other than a first or only son or an eldest daughter
“ entitled under this my will to the possession or to the first
“ estate of inheritance of the same premises) (that is to say) not
“ exceeding . . . for four or more such children . . . between
“ them £25,000 . . . and by the same or any other deed . . . to
“ charge the premises charged with such portion . . . with the
“ payment of any annual sum or sums of money (not exceeding
“ what the interest of the sum or sums of money so charged for
“ a portion . . . after the rate of £4 per centum per annum) to
“ be applied for or towards the maintenance . . . of the child
“ . . . for whom the portion . . . shall become payable, the
“ said annual sum or sums to be clear of all deductions. . . .”
Walter died on July 2, 1888. He was survived by four daughters,
who became entitled to the portions of £20,000 each given by
his will.

By deed dated June 5, 1931, Major Henry Sneyd, who was
then tenant for life in remainder of the Keele Settled Estates,
in exercise of the power conferred by Walter's will, appointed
that after the death of himself and Colonel Sneyd, the Keele
Settled Estates should stand charged with payment of “ the sum
“ of £15,000 clear of death duties (or such less sum as shall be
“ the maximum principle sum chargeable by the appointor under
“ the power now being exercised) with interest thereon at the
“ rate of 4 per cent. per annum from the death of such survivor,”
such sum to be held in trust for such of his daughters as should
be objects of the power of charging portions then being exercised.

Colonel Sneyd died on December 25, 1949. He was survived by his widow, Dorothy Charlotte Sneyd, to whom he had appointed, in exercise of the power conferred by the testator's will, a jointure rent charge of £1,800 for her life.

On the death of Colonel Sneyd, Major Henry Sneyd became tenant for life in possession of the Keele Estates. By his will, in exercise of the power conferred on him by Walter's will, he appointed a jointure rentcharge in favour of his wife, the defendant Janet Sneyd, of £1,500 a year.

Major Henry Sneyd died on August 12, 1950. He was survived by his widow, the defendant Janet Sneyd, by his infant son, the defendant Thomas Howard Sneyd, and by five daughters.

The position at the death of Major Henry Sneyd was that the infant defendant was tenant in tail of the settled estates subject, first, to the jointure rentcharge of £1,800 payable to Mrs. Dorothy Sneyd, widow of Colonel Sneyd; secondly, to the sums of £20,000 each payable for portions for the four daughters of Walter; thirdly, to the jointure rentcharge of £1,500 payable to the defendant Mrs. Janet Sneyd, widow of Major Henry Sneyd; and fourthly, to the portions payable under the deed of 1931 to the five daughters of Major Henry Sneyd.

Estate duty was payable on the death of Colonel Sneyd at a very high rate, and again became payable on the death of Major Henry Sneyd. If all the estate duty fell to be borne by the residue of the settled estates after the several portions had been fully discharged, only a comparatively small balance would be left for the infant tenant in tail.

The trustees of the settled estates took out this summons asking how the estate duty should be borne as between the various parties interested in the settled estates. The defendants to the summons were Mrs. Janet Sneyd, the various persons entitled to the portions settled on the four daughters of Walter, the five daughters of Major Henry Sneyd, the infant tenant in tail, and the tenant for life in remainder expectant on such estate tail.

Roxburgh J. held, in answer to question 1 (a) of the summons, that the portions of £20,000 each payable under the will of Walter for his daughters ought not to be charged with any part of the estate duty payable on the death of Colonel Sneyd. He further declared, in answer to question 2 (a) of the summons, that the portions appointed to the daughters of Major Henry Sneyd by the deed of 1931 ought not to be charged with any part

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of the estate duty payable on the death of Colonel Sneyd, but ought to be charged with a rateable part of the estate duty payable on the death of Major Henry Sneyd. He further declared, in answer to question 2 of the summons, that the portions appointed to the daughters of Major Henry Sneyd ought to be treated as being of the aggregate amount of £25,000 and that these portions ranked *pari passu* with the jointure rentcharge appointed by the will of Major Henry Sneyd to his widow, the defendant Janet Sneyd.

The infant tenant in tail appealed against so much of the order of Roxburgh J. as declared that the portioners under the will of Walter and under the deed of 1931 were not liable, under the provisions of section 14 (1) of the Finance Act, 1894,² to bear a rateable part of the estate duty payable on the death of Colonel Sneyd in respect of the settled estates. The five daughters of Major Henry Sneyd cross-appealed against so much of the order as declared that they were chargeable with a rateable proportion of the duties payable on the death of Major Henry Sneyd. No party appealed against the order of Roxburgh J. that the portions and jointure rentcharge appointed by Major Henry Sneyd ranked *pari passu*. His decision on that question has already been reported.³

Henry Salt Q.C. and *H. E. Francis* for the infant tenant in tail male in possession and appellant. As to the estate duty of approximately 80 per cent. exigible on the death of Colonel Sneyd on December 25, 1949, without issue; the property was on that date held on the trusts of the compound settlement in the matter of which the originating summons is rightly entitled: "In the matter of the Keele Estates in the County of Stafford settled by a compound settlement created by the will dated May 30, 1865, of Ralph Sneyd (the elder), deceased, and by the will dated June 14, 1886, of Walter Sneyd, deceased."

Walter died in 1888, before the Land Transfer Act, 1897, and the Finance Act, 1894, took effect. Although conceivably by a process of marshalling or otherwise his remote interest in

² The Finance Act, 1894, s. 14 (1): "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the Estate duty may be recovered by the person, who being authorized or required to pay the Estate duty in respect of any

property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary."

³ Ante, 306.

fee simple in remainder could have been resorted to for payment of his creditors, it never vested in his personal representatives, and being realty, specifically (though contingently) devised by him, was an asset only of ultimate resort. In fact, no resort was had to it; the property devolved under the compound settlement intact and in specie, and administration of Walter's estate had long before 1949 been complete. On December 25, 1949, the following things took place simultaneously with the death of Colonel Sneyd without issue: First, the ultimate remainder given to Walter became indefeasibly vested and was no longer liable to be divested by the barring of an anterior estate tail by any son of Colonel Sneyd. Secondly, the contingent devise in the will of Walter ceased to be contingent; thirdly, the term created by Walter's will for securing the settled portions of his daughters took effect and those portions became raisable; fourthly, a charge for the estate duty exigible on Colonel Sneyd's death and attributable to the realty comprised in the compound settlement arose under the Finance Act, 1894; fifthly, that realty passed on the death of Colonel Sneyd. The compound settlement still remained on foot after December 25, 1949, and the Settled Land Act trustees of the compound settlement became (under the Administration of Estates Act, 1925) the special personal representatives of Colonel Sneyd entitled to a grant quoad the settled realty.

They did not, however, take "as such," so that section 8 (4) of the Finance Act, 1894, never became in point. See Dymond's Death Duties, 11th ed., 1951, pp. 326-8, and authorities there cited. The decision in *In re Fuchs*⁴ is controlled by the context of section 8 (4) and has no application; and see *Lord Sudeley v. Attorney-General*,⁵ a case to be distinguished, of residuary personality subject to administration, including payment of estate duty.

Section 16 of the Law of Property Act, 1925, like section 5 of the Land Transfer Act, 1897, does not disturb the incidence of duty, and realty bears its own.

The case is one to which section 14 (1) of the Finance Act, 1894, applies; all its conditions are made out, and those interested in the portions created for Walter's daughters should contribute rateably to the duty. *In re Drake*⁶ is not in point. It would only be so if the court were considering contributions as between

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⁴ [1944] Ch. 200.⁶ [1926] Ch. 559.⁵ [1897] A.C. 11.

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derivative interests under or dealings with the interests in the portions.

As to the portions created by Major Henry Sneyd by his deed of 1931 for his daughters, these should also contribute rateably under section 14 (1) to the duties attributable to the realty comprised in the compound settlement and exigible on the death of Colonel Sneyd. Colonel Sneyd's widow's jointure is, however, exempt from contribution.

J. A. Wolfe and Wigglesworth for the several defendants interested in the portions of Walter's daughters. Section 14 (1) of the Act of 1894 has no application, and there is no section of that Act throwing a liability for estate duty on these portions. It is true that at the death of Colonel Sneyd a compound settlement existed, which resulted in the whole real estate vesting in special representatives. A compound settlement existed because there was still on foot at his death a jointure payable to his widow. Further, the charge on real estate for the benefit of portions was not created by Colonel Sneyd but by Walter as absolute owner. This charge for portions arose in 1888 when Walter died, at a time when there was no estate duty which was first imposed by the Act of 1894. In 1894 the Revenue imposed a prior duty, and it is contended that the portions payable under Walter's will were charged only on the equity of redemption on the settled estates after estate duty should have been paid. That is the first point. The second is that the portioners were entitled to a charge in possession at the moment when the liability for estate duty arose. Therefore, to bring section 14 (1) of the Act into operation would be wrong. It was the charge created by the will of Walter, who died in 1888, that created the charge in question, although it could only take effect on the death of Colonel Sneyd: see *Berry v. Gaukroger*⁷ and *In re Drake*.⁸ The portions were charged on the equity of redemption in the property settled, and therefore the portioners were entitled to the full amounts of £20,000 each. What the portioners had was a charge on Walter's interest in remainder, an inchoate interest which crystallized only on the death of Colonel Sneyd. The estate arose in the special representatives subject to estate duty, and the liability for the duty attached to the ultimate remainderman and not to the portioners, who were only entitled to a charge on the equity of redemption. [They referred also to *In re Smith, decd.*⁹]

⁷ [1903] 2 Ch. 116.

⁸ [1926] Ch. 559.

⁹ [1951] Ch. 360.

E. Wright for the daughters of Major Henry Sneyd said it was important to them as a preliminary step to resist the claim made for estate duty in respect of the portions of Walter's daughters, and in this he desired to adopt Mr. Wolfe's argument.

Henry Salt Q.C. in reply. No reliance has been placed in this court on *In re Fuchs*,¹⁰ although it was the main plank of the respondent's argument below. *In re Smith, decd.*¹¹ has no bearing on this case. All the events, including the charge for estate duty, arose on or immediately after and in consequence of the death of Colonel Sneyd on December 25, 1949, and it is not possible to split fractions of time for the purposes of one ensuing event more than another. The term "compound settlement" is not a mere conveyancing conception: see the Settled Land Act, 1925, s. 1 (1) and proviso, and section 117 (1) (xxiv). In the present case there was on December 25, 1949, and continued thereafter to be a compound settlement. The Settled Land Act trustees, as special personal representatives, having paid or arranged to pay the estate duty in question, are bound to recover contributions from both sets of portioners for the benefit of the inheritance and for the relief of the appellant tenant in tail male.

Wilfrid Hunt for the trustees.

EVERSHED M.R. The question which arises for determination is now limited to the one problem: what is the effect, as regards the properties and dispositions with which this court is concerned, of section 14 (1) of the Finance Act, 1894? In saying that the matter is resolved to that single point, I am not to be taken to be suggesting that it is an easy one, and I have been conscious of considerable variation of view as the argument has proceeded; but, having reached a conclusion, rightly or wrongly, in the matter, I think there would be no advantage to be gained from postponing the delivery of my judgment.

[His Lordship stated the facts and continued:] The first question which is raised is whether the sums charged by Walter's will have to bear some part of the large sum for estate duty which fell to be payable on the death of Colonel Sneyd, who was a nephew of the original settlor, Ralph Sneyd, and a son of Walter. If the portioners do not bear any part of the estate duty which then became exigible, the effect will be that such duty must be borne by the persons entitled to the settled property under Walter's disposition, subject to the portions term.

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¹⁰ [1944] Ch. 200.

¹¹ [1951] Ch. 360.

C. A. In effect the charge would fall upon the present infant tenant in
1952 tail, who is represented by Mr. Salt and Mr. Francis.

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Mr. Wright joins with Mr. Wolfe in saying that the effect of all the dispositions, upon the true interpretation of section 14 (1) of the Finance Act, 1894, is that the trustees, Mr. Hunt's clients, or the tenant in tail acting through them, cannot look either to the portioners under Walter's will—that is, Walter's daughters and those deriving title through them—or to the daughters of Major Henry Sneyd, the portioners by virtue of the deed of 1931, to bear any part of either of the two sums charged in respect of the death duties which became exigible on the respective deaths of Colonel Sneyd and Major Henry Sneyd.

From the facts, as I have stated them, two matters arise which clearly add to the singular nature of the circumstances of this case. In the first place, though Walter's will took effect and came into operation on his death in the month of July, 1888, the devises and other dispositions he made in regard to the property in question did not take effect until the passage of no less than 61 years: during that intervening period Colonel Sneyd was the tenant for life in possession under the terms of the original settlement made by the testator.

The second unusual feature, which makes it perhaps unlikely that the facts presented to this court will find any close parallel hereafter, is that at the death of Walter there was no such thing as estate duty: for Parliament had not then enacted the Finance Act, 1894; and not only that, but at that distant time the Land Transfer Act, 1897, had not been passed, so that real property did not pass to and vest in the personal representatives of a deceased proprietor. In the absence of testamentary disposition the real estate would go to the heir-at-law; if there was a will, it would pass to the testamentary devisee.

Those circumstances combined have made the case before us difficult and cause it to be of a rather special character: but the problem is: what is the effect of section 14 (1) of the Finance Act, 1894, in the circumstances that have occurred?

[His Lordship read section 14 (1) and continued:] Let me examine the situation that arose at the death on Christmas Day, 1949, of Colonel Sneyd. He was survived by his wife, Dorothy Charlotte Sneyd, who is represented by Mr. Wolfe and Mr. Wigglesworth. Although she appears by them in her capacity as a person interested in one of the sums charged for portions, she was also entitled, by virtue of an exercise of

a power conferred by the original settlement on Colonel Sneyd, to a jointure which sprang into being on his death, and to that extent the settlement created by the testator's will remained in operation.

According to the proper conveyancing and practice law the effect of the continuance of the settlement was that the real estates in question vested, on the death of Colonel Sneyd, in what are called, under the property legislation of 1925, his "special personal representatives," being persons who take only a vesting of the settled property, as distinct from "general personal representatives." The former are personal representatives for the limited purpose only of giving effect to the subsisting settlement and passing on the title of the settled property.

That circumstance—the continued existence of the settlement after Colonel Sneyd's death—has been called by Mr. Wolfe "fortuitous"; which, of course, it was; but then any continuation of a settlement may be regarded as fortuitous, in so far as it depends upon the continued existence of some person who is entitled to a limited interest under the settlement. I will, however, say at once that it seems to me that the fact that the settlement continued and that it was true to say that, in the hands of the special personal representatives, the Keele Estates, with which we are concerned, remain settled property is of the essence of the matter.

Colonel Sneyd having had no issue, the effect of his death was to change the interest which Walter had had under the original settlement from an absolute fee simple in remainder defeasible upon the coming into being of issue of Colonel Sneyd into a similar interest, indefeasible; in other words, on the death of Colonel Sneyd there sprang into being and effect the devises and other limitations of Walter's will.

The question is: do the terms of section 14 (1) fit the circumstances of this case? The first requirement of the application of the section is contained in the first line in the words "In the case of property which does not pass to the executor as such." It is agreed that in the circumstances of this case the settled property, which devolved upon the special personal representatives of Colonel Sneyd, is not to be described as property passing to the "executors as such." Therefore, the first condition for the application of subsection (1) is satisfied.

The subsection proceeds: "an amount equal to the proper

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“rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person” lastly referred to. As regards the second part of that subsection, again there is no question of its applicability. The special personal representatives became liable and answerable for this large sum of duty which was then exigible, and they have paid it or are in the course of so doing. Therefore, they are entitled, within the terms of the section, to recover that duty from the person who is last mentioned in this subsection. The contest is: who is that person, and does the description include the portioners in this case?

The formula is: “from the person entitled to any sum charged on such property . . . under a disposition not containing any express provision to the contrary.” I confess that, on a first reading of the subsection, it would appear tolerably plain, as a matter of language, that the portioners were persons aptly described by these words. For, as a result of Walter’s will (which, having been made before the Finance Act, 1894, naturally enough did not contain any express provision to the contrary) they were each entitled to a sum of £20,000 charged on the settled property which passed on the death of Colonel Sneyd.

The argument on behalf of the portioners, however, has been to this effect: Although the word is general—“a disposition”—there is necessarily some limitation to be imposed upon it. To take the simplest case, illustrated in such authorities as *Berry v. Gaukroger*,¹² if someone entitled under the limitations of the settlement to a sum of money charged on the settled estate has himself, by independent contract or by some derivative sub-settlement, proceeded to deal in some way with the sum charged, then the persons paying the duty described in this subsection are not in any case concerned with the persons interested under the contract or the sub-settlement. They are too remote for this purpose, and the persons so entitled cannot properly, within the meaning of this subsection, be described as persons entitled to a sum charged on the settled property.

If, therefore (and, again, I take the simplest case), settled property comes to the hands of personal representatives on the cesser of the last limitation in the settlement (other than a limitation in favour of some person absolutely entitled), so that the

¹² [1903] 2 Ch. 116.

settlement comes entirely to an end, and such personal representatives are accountable to the person absolutely entitled, it appears that an interest derivatively created by that person absolutely entitled would not be an interest to which section 14 (1) had any application.

It is said by Mr. Wolfe and Mr. Wright, with great force, that the example I have given of a derivative settlement aptly describes the interest created by Walter's will, and that it is a mere matter of history, irrelevant to this action, that the will came into operation so long ago as the year 1888, 61 years before the tenant for life, Colonel Sneyd, died. If that were so, I think all the necessary consequences would follow; but, on the whole, I have reached the other conclusion. It seems to me that at the relevant date, December 25, 1949, this property remained settled property and that the settlement then consisted of the combined instruments, the original will of the testator, the will of Walter and such other documents as had been executed pursuant to powers contained in one or other of those instruments. I venture to think that that is the inevitable common sense of the matter. If one were asked the question, "What was the settled property 'on Colonel Sneyd's death in the hands of his special personal representatives?," the answer would be: "The Keele Estates 'and the proceeds of their sale' settled by the combined effect of the instruments I have mentioned; and further, if one were asked: 'Were the sums settled by way of portions by the will 'of Walter charged on the settled estates?,' the answer would be in the affirmative. The proceedings are after all entitled "In 'the matter of the Keele Estates in the County of Stafford settled 'by a compound settlement created by the will dated May 30, '1865, of Ralph Sneyd (the elder), deceased, and by the will 'dated June 14, 1886, of Walter Sneyd, deceased." I cannot treat that description as erroneous or irrelevant.

It seems to me, therefore, that the terms of the subsection in this case are satisfied, the circumstances of the case being special in many respects. I confine my conclusion to these facts, and I attempt no answers to other possible cases which were put forward by way of illustration; but my conclusion, so far stated, will cover the case of the portioners under Walter's will, namely, his four daughters.

The situation of the five daughters of Major Henry Sneyd is a little different and requires some further, though slight, explanation. They are concerned as the result of a deed executed in

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1931, and that circumstance, again, is important. The deed was executed by him long before the estate came into his possession, but the deed was an exercise of the power to appoint portions contained in his grandfather's will, the will of Walter. That being so and the effect of the deed being equally, as I think, to charge the estates settled by the joint effect of all these instruments, no distinction emerges between the case of those portioners and the case of the portioners taking directly under the will of Walter.

I have stated my conclusion, and it is contrary to that of Roxburgh J. Upon a matter of this kind, I differ from him with hesitation and diffidence, but the grounds which supported his contrary opinion have not, I think, formed any substantial part of the argument of the respondents in this appeal, for he based himself upon the fact that, when on Colonel Sneyd's death the interest of Walter became for the first time indefeasible, there emerged what he called "an equity of redemption," that is, a freehold property subject to a charge for estate duty. In other words, he took the view that the interposition by Parliament in 1894 of the charge for estate duty had the effect, so to speak, of making the devises in Walter's will operate only upon what the judge called the equity of redemption, that is, upon what was left after the charge for duty had been paid.

With all respect, I do not accept that analysis. The duty, of course, was a first charge, but the incidence of it between the various interests created by the will or the settlement is something quite different, and to assume that Walter's will was upon its true construction dealing only with the equity of redemption, with what was left after the estate duty had been paid, is, with all respect, to my mind a begging of the question.

Secondly, the judge held that all that the persons interested in the real property passing under Walter's will were entitled to was to have Walter's estate properly administered. It may well be, since the Land Transfer Act, 1897, that such a statement is more strictly applicable, but, as I have said, when Walter died there was no Land Transfer Act and the persons who became entitled to real estate, whether as heir-at-law or devisees, became entitled to it without having to call upon the estate to be administered; indeed, there were no executors in whom any interest in the real estate vested. I cannot, therefore, accept that argument as applicable or relevant to the problem that we have to consider.

I do, however, agree with the judge in rejecting, as he did,

the theory which Mr. Wolfe put again before us and which might, if it were well founded, support the theory of an equity of redemption. That argument was that you have got to divide up by a minute process of temporal calibration the series of events which occurred, beginning with (for it was the first of them) the death of Colonel Sneyd. Mr. Wolfe said that there must be a temporal difference between cause and effect; that you must therefore assume that the death of Colonel Sneyd preceded by a period of time, however short, the attachment to the property of the charge for estate duty. Though the theory is somewhat metaphysical and the period of time is of a spectral character, nevertheless I am prepared (for the sake of argument) to accept the view that some interval of time must elapse, or be deemed to elapse, between the death and the imposition of the duty. But I cannot go further and assume that the duty attaches by some infinitesimal margin of time before there arises or springs into existence the next succeeding beneficial limitation. The property passed on the death of Colonel Sneyd and, by virtue of that passing, death duty became exigible; but I think that the coming into existence of the next limitation in succession cannot upon any doctrine or principle be postponed until after the attachment of duty. If it were so, I can see that it would help Mr. Wolfe to say that the next limitation, which was Walter's now indefeasible estate, would then attach not to the original estates in their full splendour, but to the estates after estate duty had taken its toll of them.

One other matter was presented to Roxburgh J., and that was an argument based on section 8 (4) of the Finance Act, 1894. The judge rejected that argument, following and applying the reasoning of Simonds J. in the case of *In re Fuchs*.¹³ It has been no part of the appellant's argument in this court that section 8 (4) applies, and it has, therefore, been unnecessary for us to consider that matter at all. I say, accordingly, nothing about it.

For the reasons which I have endeavoured to state in a matter complicated by its own circumstances and rendered equally by its own circumstances peculiar, I conclude that the sums of money to which the several portioners were entitled by virtue of the charges created first by Walter's will and secondly by Major Henry Sneyd's deed in 1931 are within the ambit of the language of section 14 (1) so as to entitle and require the trustees of the

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compound settlement, on behalf and in right of the tenant in tail (who are also the special personal representatives of Colonel Sneyd and I think fill every other relevant capacity that it is possible for them to do, including that of being the statutory owners for the tenant in tail himself), to look to the sums respectively charged "as and for portions" to bear a rateable part of the several sums of duty.

I think, accordingly, that the appeal should be allowed upon this point, and that the answer to question 1 (a) of the summons should be in accordance with my judgment.

BIRKETT L.J. I agree and have nothing to add.

ROMER L.J. I quite agree with the judgment which the Master of the Rolls has just delivered, but I will add a word or two, not because the whole matter has not been fully dealt with by him but because the arguments before us seem to have followed, as he has indicated, a somewhat different course from those which were presented to the judge in the court below.

The whole question really, as presented to us, has turned upon section 14 of the Finance Act, 1894, and it was agreed (and, indeed, quite plainly it is so) that section 8 (4) of that Act, upon which a good deal of argument seems to have turned before Roxburgh J., is out of the picture, because that only deals with cases where property passes on the death of the deceased and the executor is not accountable for the estate duty in respect of such property, whereas it was agreed before us on all hands that the special representatives of Colonel Sneyd were accountable by reason of section 16 (1) of the Law of Property Act, 1925.

Therefore, all that we have to consider is whether the position is brought within the language of section 14 (1) of the Finance Act, 1894. It appears to me that, if one just takes the language as one finds it and applies it to the position as it arose on the death of Colonel Sneyd, subsection (1) applies, because all the requisite elements are present. It was a case where property did not pass to the executor as such, but the executor was authorized or required to pay the estate duty leviable in respect of that property. The "property" in question was the settled estate, and the next subject for inquiry then is whether there was a person entitled to any sum charged on the settled estate under a disposition not containing any express provision to the contrary.

It seems to me clear at first sight that there were persons here entitled to sums charged on the property, namely, the portioners

through the trustees carrying into execution the trusts of the portions term which were set up by the will of Walter. Then were those charges in respect of sums charged "on such property," "such property," as I have indicated, being referable to the property referred to in the earlier part of the section—in this case the settled estate? The answer to that, I should have thought, was Yes. The portions were raisable out of the whole of the settled estate. Therefore, it is not easy at first sight to see why that subsection should not apply and why a contribution should not be levied upon the trustees of the portions term, the result being to reduce the portions payable.

It was argued, as I understood it, that the personal representatives, who were the Settled Land Act trustees of what was a compound settlement and, however fortuitously, continued to be a compound settlement after the death of Colonel Sneyd, were only concerned with charges which had been brought into being under or by virtue of that settlement. I suppose that it is clear that some limitation has to be put upon the very general language in which section 14 (1) is couched, and it may be (it is not necessary to decide it) that they would not be concerned with a charge which had been brought into being by some instrument, or coming from some source, which was wholly unconnected with the settlement of which the personal representatives were the trustees. In this case, however, the charges were brought into being by one of the instruments which together constituted the compound settlement, namely, the will of Walter. Therefore, whatever restrictions one places upon the generality of the language that one finds in the subsection, it seems to me that this charge, on the facts of the present case, is within the language used.

It is next suggested, as I understood the argument, that in a sense the charge for the portions is to be regarded as a derivative charge, or as coming into being under a derivative settlement; but that is not so. It is quite true that, if one of these portioners had charged by way of mortgage her portion, then on Colonel Sneyd's death section 14 (1) would not operate as against the mortgagee of that portion, and the reason, as is clearly stated by Sargant L.J. in *In re Drake*,¹⁴ is that the section is fully executed as against the original chargee and, having been fully executed, it is exhausted and there is nothing of the subsection to survive, so as to have any effective operation against derivative interests

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carved out by the original chargee. That, however, is not this case, because none of the portioners has mortgaged or in any other way alienated her share. One is only concerned with the original chargees as representing the respective portioners.

Then it is suggested that the property on which the portions were charged was not the same property as that which did not pass to the executors as such, but in respect of which they were authorized or required to pay the duty. It was said that the property in respect of which they were authorized or required to pay the duty was the entirety of the settled estate, whereas all that the portions were charged on was something in the nature of an equity of redemption, which would differentiate that property from the property which, as an entirety, was subject to duty. The suggestion was that, by reason of the passing of the Finance Act, 1894, from that moment onwards there was a sort of inchoate charge fastened upon this property and that, although until 1894 it was true to say that the portions were charged on the whole of the property, if and when it fell into possession in Walter's estate, thereafter it was only a charge on the property subject to a prior charge for estate duty, and all that Walter's estate had from that moment onwards was an interest in property which was subject to an inchoate charge in favour of the Estate Duty Office, which charge would crystallize if and when the duty became exigible.

I cannot take that view of the matter. There was not a charge. The passing of the Finance Act, 1894, gave rise to no charge at all. There was no charge of any sort or kind fastened on this property in respect of estate duty down to the time of the death of Colonel Sneyd. From 1894 onwards everybody knew that eventually, if on the death of Colonel Sneyd without issue the property reverted to the estate of Walter, duty would be payable and that duty would, by virtue of the provisions of the Finance Act, be a charge, but that is very far away from saying that, during the lifetime of Colonel Sneyd, there was a charge of any sort or kind, because there was not; there was nothing more than an expectation of a future charge. The result was that, in my opinion, on the death of Colonel Sneyd the portions were charged upon the whole of the property and not merely on something which could be described as an equity of redemption.

Finally, there was the question of the sequence of events, with which my Lord has fully dealt, the suggestion being that, as the death of Colonel Sneyd gave rise to the claim and charge for duty, that operated at once, and everything else must be deemed to

have taken place afterwards; and, therefore, in that alternative way, one gets at the position that the portions were only raisable out of the property subject to the charge. That is a very metaphysical conception, and it seems to me that all the relevant events were brought about solely by the death of Colonel Sneyd without issue, and that they all happened simultaneously: the falling into possession of the property into Walter's estate, the right of the portioners to their portions, and the right of the Estate Duty Office to the duty; and, although truly the right of the Estate Duty Office to the duty took priority in point of charge over the rights of the portioners or the trustees as representing them, it did not, in my opinion, take preference in point of time, because, as I say, these things all happened together and it is too much of a refinement to say that one happened before the other or to apportion out some kind of sequence of time to the various events respectively.

Accordingly, for these reasons and those which my Lord has given, I agree that this appeal should be allowed; and I repeat that most of the arguments which were presented to this court were apparently not presented to Roxburgh J., or, at all events, he decided the case apparently on points on which no reliance has been placed in this court and did not deal with the difficult points which have in fact been presented to us.

I accordingly agree that the appeal should be allowed.

Appeal allowed.

Leave to appeal to the House of Lords.

The court, having delivered judgment on the appeal by the tenant in tail, heard argument on the cross-appeal of the daughters of Major Henry Sneyd, claiming under the deed of 1931, as to the construction of that deed.

E. G. Wright for the daughters of Major Henry Sneyd. It is submitted that, on the true construction of the power contained in the will of Walter, Major Henry Sneyd had power to appoint a sum of £25,000 "clear of all deductions"; that means clear of any deduction for death duties. The daughters of Major Henry Sneyd are accordingly entitled by virtue of the appointment in the deed of 1931 to have the sum of £15,000 raised free from all liability to contribute to the estate duty which became payable

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on Major Henry Sneyd's death. It appears from the decision in *In re Smith-Bosanquet*¹⁵ and *In re Sebright*¹⁶ that where there is power to appoint an annual sum "free of deductions," that the annual sum will not be called on to contribute to estate duty. The same principle should be applied here. It is submitted that there was here an appointment of a net sum; alternatively, if it was an appointment of a sum plus duty, it was authorized by the power. The power defines the maximum of the benefit to be taken, not the maximum sum to be charged to secure that benefit.

Henry Salt Q.C. and *H. E. Francis* were not called on to argue in reply.

EVERSHED M.R. The second point which has been raised is, in brief, whether the deed of 1931 executed by Major Henry Sneyd, to which I alluded in my earlier judgment, was an excessive exercise of the power conferred upon him by Walter's will to appoint or to charge the settled estates with sums for portions, if and so far as the effect of it is to leave a clear sum for portions of £15,000 without any deduction from that sum having to be made in respect of the power of recoupment conferred by section 14 (1).

Certain matters, I think, may be stated as being relatively plain. First, as regards the power of appointment, it is, in my judgment, clear enough that all that Major Henry Sneyd was empowered to do was in the circumstances of this case (that is, having regard to the number of his daughters) to charge the settled estates with a total figure for providing portions of £25,000 and no more. Mr. Wright has argued that the power in Walter's will fairly can be and should be construed as permitting the appointor to charge an amount exceeding £25,000 by whatever is the necessary sum, so as to produce the result that, when the sum charged has made whatever contribution towards estate duty it ought to make, there will be a figure left of £25,000 (net) for the enjoyment of the portioners. I agree with Roxburgh J. that such a result cannot be fairly attributed to the sense of the language used, and I agree with him also that some support for that view is to be derived from the formula "to charge the" estates with payments of sums as and for portions."

If that is right, then next it is also quite clear, to my mind, that any exercise or purported exercise of the power which has

¹⁵ [1940] Ch. 954.

¹⁶ [1944] Ch. 287.

the effect of charging the settled estates with a figure greater than £25,000 in respect of portions would be excessive. That, I think, as a proposition is conceded; but Mr. Wright has argued that, upon its true construction, the document exercising the power did not really have that effect. And he has further contended that the deed of appointment should be treated as a "disposition to the contrary" within the terms of section 14 (1) so that, without really raising at all the question of excessive exercise, the practical result is that the right of the trustees to go upon the portioners for their rateable part of the estate duty in accordance with the section is thereby displaced.

I think that the proper approach in these cases must always be to look first at the document and to see what it means. The relevant words are found in clause 4 of the deed, and are these: "The trustees shall" at the date specified "raise the sum of" £15,000 clear of death duties (or such less sum as shall be the "maximum principal sum chargeable by the appointor under the "power now being exercised)," and so on.

As a matter of plain terms, it seems to me that this appointor is saying: "I desire to charge the settled estates with either (i) a "figure of £15,000 clear of death duties (meaning thereby a "figure of such magnitude that there will remain £15,000 clear "when all charges or contributions in respect of death duties "are provided for), or (ii) if that is greater than the amount "which the will of Walter tells me that I can charge, then the "maximum sum that the will authorizes." As a matter of plain English, it seems to me that that is what it says.

I am further unable to accept Mr. Wright's proposition that this deed of appointment can be regarded as being a disposition intending an express provision to the contrary within the meaning of section 14 (1) so as to take the case altogether out of that subsection and relieve the sums charged for portions of any liability to contribute and so also as to enable him to say that all that was charged was £15,000.

Section 14 (1) (which has already been considered in our earlier judgments) provides that, in the case of property passing on the death otherwise than to personal representatives as such, persons, such as the special personal representative of Colonel Sneyd, are entitled to recover a proper rateable part of the death duties, chargeable on the death, from persons entitled to sums charged on that property; unless the disposition—whatever for the moment that noun may cover—contains an express provision

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to the contrary. I think that language must mean an express provision making inapplicable the earlier part of the section and so freeing the persons entitled to sums charged on the property from liability to provide the rateable part of the death duty which otherwise the trustees would be entitled to recover. That seems to me to be something different from a provision which seeks to measure the sum to be charged by reference to the net figure that would be left after the liability for duty under this or any other section had been discharged.

Treating the matter, therefore, as one entirely free from authority and governed by the language of the material instruments, I entirely agree with Roxburgh J. that the first alternative which Major Henry Sneyd put in his appointment is, on the facts of the case, excessive. But I cannot leave the matter there, for Mr. Wright has very properly drawn our attention to two cases.

The first was that of *In re Smith-Bosanquet*,¹⁷ which was decided by Bennett J. in 1940. That was a case where power was given to a tenant for life under a settlement to appoint for the benefit of his widow any part of the income of the residuary trust income not exceeding £2,000 a year for the rest of her life. He purported to appoint and did appoint £2,000 a year "free of "all deductions"; and it was conceded that the amount expressed to be so appointed was a clear amount without liability to reduction as the result of a charge for estate duty and the way in which such a charge might be distributed among the persons entitled. In the argument for the widow, Mr. Vaisey, as he then was, put the case thus: The income of the residuary estate means the income of the estate after estate duty has been paid; and, therefore, the appointment was competent, because it only charged that income (that is, the income of the estate after all duty had been paid) with the figure specified, namely, £2,000 per annum.

In the course of his judgment, however, the learned judge may be said to have based himself on a different view of the matter, if his view is properly reported in the judgment. He said¹⁸: "It seems to me that, so long as the appointment made "in exercise of the power does not charge the income of the "residuary trust fund with a greater annual amount than "£2,000, the appointment is within the terms of the power." So far he seems to have followed the argument presented by

¹⁷ [1940] Ch. 954.

¹⁸ *Ibid.* 959.

Mr. Vaisey; but then he used language which seems to indicate that in any case the use of the expression "free of all deductions" was (contrary to the view I have already indicated) a disposition "to the contrary" within the meaning of section 14 (1) of the Finance Act, 1894.

In a later case, *In re Sebright*,¹⁹ a similar question arose in regard to a jointure. In that case, a tenant for life was empowered to charge the settled property with a jointure in favour of a widow not exceeding £600 a year. In exercise of that power the tenant for life appointed the sum of £600 a year for the residue of the life of his wife "without any deduction." Much of the argument turned upon the question of income tax and does not arise here. But in the course of the arguments it was contended by the widow that the matter was governed in principle by *In re Smith-Bosanquet*.²⁰ Sir Norman Touche, in answer, put the matter thus²¹: "In *In re Smith-Bosanquet*²² "the annuity was payable out of the income of a residuary trust fund, the amount of which was only arrived at after payment "of estate duty." That reflected Mr. Vaisey's argument in *In re Smith-Bosanquet*²²: "That does not apply here. The judgment in that case does not make it clear on what ground it "was decided, but if it is indistinguishable from the present "case, it was not correctly decided."

The learned judge, Vaisey J., said²³: "Did they"—that is, the appointors; for there was, I may say, another appointment of the same kind—"by reason of the direction, go beyond the "permitted limit of £600? The contention that they did so is "supported by some authorities of great weight"; and he referred to them. "I am, however, faced with a recent decision "of Bennett J., namely, *In re Smith-Bosanquet*,²⁴ which I "consider, after some hesitation, covers the present case, and I "shall follow it."

We are in this case concerned with a charge on the corpus and with the language of these two instruments. I do not think that the decisions in *In re Sebright*²⁵ or in *In re Smith-Bosanquet*²⁶ are of such a character as to be indistinguishable in any event from the present case; and I, therefore, feel at liberty to decide the present case, as did Roxburgh J., without regard to the decisions in those cases. But, if I comprehend

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¹⁹ [1944] Ch. 287.²⁰ [1940] Ch. 954.²¹ *Ibid.* 291.²² [1940] Ch. 954.²³ [1944] Ch. 287, 294.²⁴ [1940] Ch. 954.²⁵ [1944] Ch. 287.²⁶ [1940] Ch. 954.

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the cases aright, I think Sir Norman Touche, in his argument in *In re Sebright*,²⁷ correctly justified the decision in *In re Smith-Bosanquet*,²⁸ on the ground that the sum appointed was payable out of the income of a residuary trust fund, which would be arrived at after all relevant deductions for death duties. Vaisey J. was obviously in a difficulty; and, in the circumstances, I am disposed to agree that he could do no other than follow Bennett J.'s decision in the case of *In re Smith-Bosanquet*.²⁸ But I need not say more about those two cases, for I think that they do not cover a case such as the present, where in plain terms (as I think) authority was given to charge the settled estates with a capital sum of a limited amount and where the necessary effect of the language of the appointment or the first alternative in the deed of appointment would inevitably be to charge the settled estates with a larger figure than that figure.

For those reasons, I think that on this point Roxburgh J. arrived at a correct decision and, on this aspect of the matter, I would dismiss the cross-appeal.

BIRKETT L.J. I agree.

ROMER L.J. I also agree with the judgment of the Master of the Rolls, and in particular I should like to associate myself with the observations which he has made with regard to the cases of *In re Smith-Bosanquet*²⁸ and *In re Sebright*.²⁹ I agree that the appeal on this point fails:

Appeal dismissed.

Leave to appeal to the House of Lords.

Solicitors: *Hunters; Nicholl, Manisty, Few & Co.; Royds, Rawstorne & Co.; Cunliffe & Airy, for Knight & Sons, Newcastle-under-Lyme.*

B. A. B.

²⁷ [1944] Ch. 287.

²⁹ [1944] Ch. 287.

²⁸ [1940] Ch. 954.

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Mar. 13, 14.

[1949, H. 3646.]

Contract—Frustration—Contract for sale of land—Compulsory purchase order and notice to treat served before completion—No frustration.

In 1938 certain vendors contracted to sell and purchasers to buy freehold land in two portions, the contract providing that the purchasers should in each conveyance or transfer covenant not to use the land otherwise than as a building estate to be developed. The purchasers paid a deposit on the whole purchase price and completed the purchase of the first portion. That of the second was delayed by, among other things, the outbreak of war in 1939. In 1948 the local authority made a compulsory purchase order affecting, among other land, all of the second portion, and the purchase of it was never completed, the purchasers ultimately paying the vendors interest on the purchase price from June 22, 1939 to January 31, 1949. In 1949 the local authority gave the purchasers and the vendors notice of the order and served on them notices to treat. The purchasers brought an action alleging that they had entered into the contract on the footing that they would be able to develop the land after completion and claiming a declaration that they were discharged from liability under the contract and return of the interest. The defendants counterclaimed for specific performance of the contract so far as it related to the second portion:—

Held, dismissing the action, (1) that, in such a case, where the date for completion was long past, the purchasers, subject to paying the purchase money, were to be regarded as the owners of the land; (2) that the notional parties to the notional contract set up by the notice to treat between the landowners and the local authority were the purchasers (the owners of the land) and not the vendors; (3) that the contract of 1938 had not been frustrated and could and ought to be carried out.

Morgan v. Manser [1948] 1 K.B. 184 distinguished.

ACTION.

By a contract dated January 13, 1938, the defendant vendors agreed to sell, and the plaintiff purchasers to purchase, certain land in Middlesex. Clause 1 provided that the vendors should sell and the purchasers buy for £875 an acre the fee simple of (1) land comprising about 41 acres and called section A, and (2) land comprising about 18 acres and called section C. Clause 2 provided that the purchasers should pay to the vendors £5,190 as a deposit and should be entitled to take up the property (i.e., sections A and C) in three portions, the first half of section A on

VAISEY J. January 31, 1938, the rest of it on July 31, 1938, and the whole
1952 of section C on January 31, 1939, on the purchasers' paying in
each case the appropriate part of the purchase-money apportion-
able to the land taken up with interest at $4\frac{1}{2}$ per cent. per annum
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By clause 6 the purchasers were, in the conveyance or transfer, to enter into restrictive covenants to the effect that the land should not be used otherwise than as a building estate to be developed in a particular manner, the number of "residential units" as therein described being not less than the maximum density provided for the area by the town planning authority.

Clause 13 provided that, notwithstanding the completion of the assurance of any part of the land (i.e., of sections A or C), the contract should remain in force with regard to the conditions therein contained or deemed incorporated therein (from certain general conditions previously referred to) and anything else remaining to be done thereunder and not provided for in the assurance.

The purchasers paid the deposit to the vendors and in due course took up, and the vendors assured to them, all section A, in which transactions the whole deposit of £5,190 was taken into account. None of section C was taken up or assured and the contract was unperformed with regard to section C save that the purchasers paid to the vendors £3,677 1s. 10d., representing interest, less income tax, payable under clause 2 on £15,903 2s. 6d. (the purchase price of section C) from June 22, 1939, to January 31, 1949.

In or about April, 1947, Middlesex County Council were willing to buy section C from the purchasers at £1,000 an acre, provided that the purchasers could get rid of the obligation to be imposed by way of restrictive covenant. The vendors, however, would not relinquish that part of the contract.

On or about October 11, 1948, Middlesex County Council made a compulsory purchase order affecting, among other land, all section C; on or about March 10, 1949, that order was confirmed by the Ministry of Education, subject to a modification immaterial to this report; on or about March 30, 1949, Middlesex County Council gave notice of the order to the purchasers and the vendors; and, on or about July 14, served on them notice to treat under the order and the relevant Acts.

By their statement of claim, delivered on November 24, 1949, the purchasers alleged that, on the true construction of the

contract and in the circumstances at the time when the contract was made, the purchasers and vendors entered into the contract on the footing that the purchasers would still be able to develop the land (including section C) in accordance with clause 6 at the time when the land should be assured to the purchasers. They alleged also that they were discharged, on or before the date of the service of the notices to treat, from liability to perform any of the agreements on their part contained in the contract, and that they became entitled to recover from the vendors the said sum of £3,677 1s. 10d., being the interest, less tax, which had been paid on the purchase price of section C. What in fact had happened was that the matter had been long delayed, partly owing to the outbreak of war. The taking up of section A, however, had been before the war, namely, on June 26, 1939.

The purchasers claimed (1) a declaration that they had been discharged from liability as above stated, and (2) repayment of the sum of £3,677 1s. 10d. They did not ask for rescission of the contract, but alleged that it had been automatically, or, at any rate completely, discharged, without need for an order. By their counterclaim the vendors alleged that the purchasers had accepted the vendors' title; that, by letter dated October 13, 1949, the vendors' solicitors called on the purchasers through their solicitors to complete the purchase within a reasonable time, but that the purchasers' solicitors did not answer the letter nor did the purchasers complete; and the vendors counterclaimed specific performance of the contract so far as it related to section C or, alternatively, damages for breach of contract.

Raymond Jennings Q.C. and *M. Gravenor Hewins* for the plaintiffs, the purchasers. The contract qua section C cannot be completed. Its whole purpose was that the purchasers should acquire a building estate for development, and they cannot acquire section C to that end or at all. Under a contract for the sale of land the vendor's obligation is not only to deduce title but to convey the land free from incumbrances: see *Williams on Vendor and Purchaser*, 4th ed. (1936), pp. 35-37; and that is the obligation of the vendors in the present case. They cannot, however, perform it; for the notice to treat, which was served on the vendors as well as the purchasers, is analogous to a contract between the vendors and the local authority: see *Cardiff Corporation v. Cook*¹; and prevents the vendors from conveying the land to the purchasers free from incumbrances. Their fulfilment of

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the obligation so to do is a condition precedent to the purchasers' liability to pay the purchase price. Since the purchasers cannot now develop section C as a building estate, the whole purpose of the contract is gone and it has been frustrated: *Morgan v. Manser*²; *Joseph Constantine Steamship Ltd. v. Imperial Smelting Corporation*³; *In re Winslow Hall Estates Co.*⁴; *Cook v. Taylor*⁵; *Oppenheimer v. Minister of Transport*⁶; and it follows that the plaintiffs are to recover the interest which they have paid: Law Reform (Frustrated Contracts) Act, 1942. True, there has been considerable delay, but time was never of the essence of the contract and the delay is irrelevant. Although there is no decided case on all fours with the present, the court ought to grant the declaration and relief asked.

D. Scott Cairns Q.C. and *J. F. Bowyer* for the defendants, the vendors. The contention that the contract cannot be completed qua section C is ill-founded. Notwithstanding the outbreak of war and any other contributory causes of delay, the purchasers could have completed at some time in the 12 years and, indeed, can still do so. In so far as they did not, delay is due to them, and—conceding that time was not of the essence of the contract—if the purchasers would not complete, naturally the vendors could not. True, the purpose of acquiring the land was to develop it as a building estate, and that purpose cannot now be fulfilled since the land cannot be acquired. Nevertheless, this case is not like *Morgan v. Manser*.⁷ There, the contract could not be carried out because the defendant, a music hall artiste, was called up for service. Here, it can still be fulfilled to the extent that the purchasers will receive, not the land, but the compensation money payable under the compulsory purchase order. It cannot, therefore, be properly said that the contract has been frustrated. Accordingly the court ought not to grant to the purchasers the declaration and relief for which they ask, but ought to grant to the vendors a decree of specific performance.

VAISEY J. [having stated the facts]:—I regard this case as based, according both to the pleadings and to the arguments, on a plea of frustration. The doctrine of frustration is not easy, and there are rival theories about its foundation. Some high judicial authorities have supposed that it rests on an implied contract, or an implied term which must be deemed to be implicit in the

² [1948] 1 K.B. 184.

³ [1942] A.C. 154.

⁴ [1941] Ch. 503.

⁵ [1942] Ch. 349.

⁶ [1942] 1 K.B. 242, 250.

⁷ [1948] 1 K.B. 184.

contract as it stands as applied to some unforeseen, unpredictable and unknown state of circumstances which has arisen. The other view is that there is not to be implied any term justifying the release of the parties from the bargain and the destruction of the contract, but that the idea of frustration depends on some such consideration as that the event which has happened has so completely destroyed the subject-matter and altered the circumstances that the contract can no longer be carried out and recognized, and must therefore be deemed to be (in equity, for the contract in the present case is, of course, an executory contract) no longer enforceable, and indeed no longer in existence, so that it cannot be specifically performed by either party, nor can any damages be recovered for any alleged breach of it.

So regarded—i.e., as an action based on alleged frustration—the present case is difficult. It is certainly remarkable, as is agreed by counsel on both sides, that there is really no authority either precisely in point or in the nature of an analogous case, and it is rather surprising that there is no such authority. If a compulsory purchase order—it matters not at what stage in the making of the order the vital moment is said to arrive—affects land subject to an uncompleted contract, and has the effect either of putting the vendors in the position that they are in breach of the contract and unable to perform it, or of frustrating it, it certainly is strange that this matter has not, apparently, been dealt with judicially hitherto. I should have thought that the situation must have arisen in a great many cases, and, in the large majority of them, must have been a most important point for consideration in the position of the parties (that is to say, vendors and purchasers) as between themselves; and the complete absence of authority rather suggests to my mind that, although this doctrine of frustration may operate in some circumstances, it does not operate normally in the case of contracts for the sale of land.

What is the effect of the compulsory purchase order on the rights and position of, first, the purchasers, and, secondly, the vendors? Undoubtedly the position of the vendors in an unperformed contract for the sale of land is radically different, in quality and in nature, from that of the purchasers. I have always understood (and indeed it is a common-place) that when there is a contract by A to sell land to B at a certain price, B becomes the owner in equity of the land, subject, of course, to his obligation to perform his part of the contract by paying the purchase-money; but subject to that, the land is the land of B, the purchaser.

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What is the position of A, the vendor? He has, it is true, the legal estate in the land, but, for many purposes, from the moment the contract is entered into he holds it as trustee for B, the purchaser. True, he has certain rights in the land remaining, but all those rights are conditioned and limited by the circumstance that they are all referable to his right to recover and receive the purchase-money. His interest in the land when he has entered into a contract for sale is not an interest in land; it is an interest in personal estate, in a sum of money; and it seems to me that in a case such as this, when the date for completion is long past, the purchasers, subject to the payment of that purchase-money, are to be regarded as the owners of the land. So I think they are; and the effect of this notice to treat and this compulsory purchase process is merely to place an obligation on those who are already the owners of the land in question. The compulsory purchase order does not affect the vendors; they have no interest in the matter save in respect of the purchase-money which they are entitled to be paid. The persons who are affected by the compulsory purchase order are the owners of the land, namely, the plaintiffs, i.e., the purchasers.

In *Cardiff Corporation v. Cook*⁸ Romer J. quotes from the judgment of Kindersley V.-C. in *Haynes v. Haynes*⁹ these words: “‘I consider that the notice to treat constitutes, as “‘between the landowner and the company’”—i.e., the landowner and the person giving the notice to treat—“‘the relation “‘of vendor and purchaser to a certain extent and for certain “‘purposes . . . and that some of the consequences which flow “‘from an actual contract also follow upon the notice to treat; “‘such as that the particular lands which the company are to “‘take, and which the landowner must give up to the company “‘after certain steps prescribed by the Act shall have been taken, “‘are fixed, and that neither party can get rid of the obligation, “‘the one to take and the other to give up the lands specified “‘in the notice; and that such is the meaning to be attributed “‘to those expressions, which may have dropped from learned “‘judges, which seem to intimate that it is a contract; but that “‘in no other sense and to no further extent does the notice “‘constitute a contract, at least on the part of the landowner.’” That deals with the simple position as between the authority serving the notice and the fee simple owner of the land.

When, however, I try to apply that to the position on the one

⁸ [1923] 2 Ch. 115, 121, 122.

⁹ (1861) 1 Dr. & Sm. 426, 450.

hand of the local authority, and on the other of the two parties who are still concerned with the land, I find it very difficult to hold that it is the vendor who is the person who is the notional party to the notional contract. I should have thought that it is the owner of the land who is the notional party to the notional contract; and in this case it appears to me that it is the purchasers who have been subject to this notice to treat, and that the vendors are really unconcerned with it. I agree that this compulsory purchase order very much altered the situation, but I cannot appreciate that it has altered it in such a fundamental and catastrophic manner as to justify the court in holding that the whole contract has been frustrated. I see no objection at all to the contract being completed by conveyance after the notice to treat has been served, or indeed at any time, even today. The land could have been conveyed on the purchase-money being paid by the purchasers to the vendors. It would have to be conveyed, I think, subject to the restrictive covenants; but how far anyone in the future is going to have the right to enforce those covenants, I neither know nor pause to inquire. It would also have to be made subject to the compulsory purchase, which would put the purchasers in exactly the same position vis-à-vis the authority as they would have been in had they completed the contract within a reasonable time after the completion date; and it will be for them, if they think proper, to reopen negotiations with the county council to try and obtain some modification of the compulsory purchase order, or to deal with the compulsory purchase order by attending the necessary public inquiry and endeavouring to come to suitable terms about the price which they will receive from the authority for their lands. I say "their" lands because, as I have said, I think that they are the purchasers' lands; and notwithstanding that a notice to treat has, quite properly, been served on both parties, just as I think it would have to be served in cases where there were easements, long terms of years, or anything similar. The vendors in this case clearly retain until completion an interest in the land, which interest undoubtedly requires that they shall be bound, and shall concur in all the necessary steps to implement this compulsory purchase.

That, however, does not, in my view, deal with the point. The vendors are brought into the compulsory purchase proceedings because their concurrence will be necessary; but the normal way to carry that out is by a conveyance from those who agreed to sell to those who agreed to buy, mentioning, no doubt, the

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existence of the compulsory purchase order. To say, however, that the contract has been frustrated goes far beyond any authority cited to me and does not accord with what I understand as frustration of a contract. In some cases, of course, the notice to treat might be advantageous. A purchaser might be pleased to have had a notice served during the pendency of the contract. If, however, this action is to succeed, apparently such a purchaser has no alternative and, however much he might like a notice to treat, apparently—according to the claim in this case—he would be discharged from all obligations from the outset; and however much he might welcome a compulsory purchase order, he would nevertheless be told, if he wished to enforce his contract, that the compulsory purchase had brought it—somewhat surreptitiously, I gather—to a premature termination, and, indeed, that it no longer existed. Undoubtedly, the whole of the compensation money under the compulsory purchase order in the present case will have to go to the purchasers—assuming, of course, that they complete; and, as I have said, I think that the compulsory purchase order affects the purchasers alone; it affects the vendors only in so far as they are given notice of it; and if they choose to enforce the contract—that is to say, the written contract of January 13, 1938—the vendors are under no obligation to do anything except to convey the property subject to, among other things, this compulsory purchase order.

✓ No doubt these departmental interferences and interventions do make a very great difference to ordinary life in this country, but that does not mean that, whenever such interference or intervention takes place, parties are discharged from bargains solemnly entered into between them. In my judgment, it is the duty of the parties, in such a case as this, to carry out their obligations; and I cannot see that there is in this case any reason at all for supposing that there is either an implied term of this contract that it should be frustrated in the event which has happened, or that there has been such a destruction of the fundamental and underlying circumstances on which the contract is based as to justify my saying that the contract did not exist, or ceased to exist at the date when the notice to treat was served, or at any other date in the process of the making and carrying into effect of the compulsory purchase order.

The nature of frustration has been very well defined by my brother Streatfeild in *Morgan v. Manser*,¹⁰ where he collects

¹⁰ [1948] 1 K.B. 184.

together in a most convenient form the various pronouncements which have been made on this somewhat obscure subject. I do not, however, see how the origin and juridical basis of the principle affects the present case. I do not think that it really matters for this purpose. However the doctrine arose, and whatever its basis, I do not find that it can be applied in the present case. *Streatfeild J.* held that there was such a change of circumstances and of such a duration that the original contract, looked at as a whole, was invaded by the call-up of the defendant, who was a music hall artiste, and so fundamentally as to be held to have been frustrated by that event.

Applying his words to this case, I cannot hold that the contract here has been frustrated fundamentally, or indeed, at all. The purchasers in this case are certainly no worse off than they would have been if they had completed their contract in a period rather less than 12 years from the time when they agreed to complete it. Had they completed the contract without the delay of 12 years, quite clearly the compulsory purchase order would have affected them. However that may be, I have to consider the matter as I find it; and taking into consideration the long delay which has taken place, I still think that the contract, so far from being frustrated, can and should be carried out.

For the best statement as to the two views on which the doctrine of discharge from liability by frustration can be justified, I would refer to a passage in the opinion of Viscount Simon L.C. in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*¹¹

In addition to basing the matter on frustration simpliciter, Mr. Jennings took certain other points which strictly, I think, are not open to him on his pleadings, but in my judgment no difficulty should be raised as to that, and I regard the statement of claim as sufficiently wide to raise all the points which Mr. Jennings adumbrated in his argument. He submitted that the notice to treat is analogous to a contract between the Middlesex County Council and the defendants which obliged the defendants—that is to say, the vendors under this contract—to convey the property to the county council. I think that that is entirely the wrong way in which to put it. I think that the duty of the vendors is to convey the property to the purchasers, subject to the notices to treat which were attached to the land, and of which the purchasers would have notice. Mr. Jennings argues that the

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¹¹ [1942] A.C. 154, 163.

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existence of the notice to treat is an incumbrance, and a condition which prevents the vendors from being able to fulfil their part of the bargain by conveying the property and giving a clean title to the purchasers. My own view, however, is that it is not a condition of that kind. I think that it is something which concerns the purchasers and does not concern the vendors; and the vendors being, in the view that I take, unaffected by the compulsory purchase order, it is for them to convey the land direct to the purchasers, no doubt carefully mentioning the compulsory purchase order in the conveyance. Everyone, however, knows of that order's existence, and the situation is one with which it is for the purchasers and not the vendors to deal.

During the argument there was much discussion as to which party was in breach. Mr. Jennings quite truly pointed out that time has not been made the essence of the contract; but the purchasers were undoubtedly in default in not offering to complete. Twelve years have gone by, and in the letter of October, 1949, to which I was referred, they were asked to complete, and have never done so. I see no reason at all for supposing that the vendors have at any time been either unwilling or unable to complete. The title to both section A and section C appears to be the same. There is no doubt that the title to section A has been accepted, and I do not see the slightest reason why, if the money was available on the purchasers' side, almost at any time during the past 12 years this land could not and should not have been assured to the purchasers by the vendors. As I have said, this question about the ability and willingness of the parties to carry out their respective parts of the bargain is not really raised on the pleadings, but I do not think it necessary to amend them to enable the point, which, in my view, is without substance, to be more formally raised.

I give judgment for the defendants on the counterclaim. They are entitled to a decree for specific performance in the form which is usual when the title has been accepted. It will, of course, be quite clear (and some words indicating it must be put into the order) that the vendors, the defendants, have no right to or interest in the compensation money payable under the compulsory purchase order. That concerns the purchasers alone, provided that, when they get the property in the normal course of events into their hands from the vendors, they will be (and indeed are alone) entitled to deal with the Middlesex County Council and to make such terms as are possible with the council. That will be

my order on the counterclaim, and that order must carry the costs of the counterclaim. I dismiss the action with costs. VAISEY J.

I should like to say in conclusion that I am very much obliged to counsel on both sides for their very interesting submissions.

Judgment for defendants.

Solicitors: *W. F. Foster, Hedge & Clare; Howard, Kennedy & Co.*

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[1950 R. 622.]

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Company—Director—Chairman—Dismissal—Articles of Association—Article providing “appointment shall be determined ipso facto”—Notice not required—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), Sch. I, Table A, art. 68.

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Morris L.JJ.

The company's articles of association consisted of Table A of the First Schedule to the Companies Act, 1929, with certain modifications and included art. 68 of Table A which empowers the directors to appoint one of their body as managing director for such term and at such remuneration as they think fit; and it provides that “his appointment shall be subject to determination ipso facto . . . “if the company in general meeting resolve that his tenure of the “office of managing director . . . be determined.” At the first meeting of the company in January, 1932, the plaintiff was appointed managing director at a salary of £7 a week. In 1948 the plaintiff became a sick man and the company was doing badly; and on March 15, 1949, the directors decided to remove the plaintiff from being managing director and this was afterwards confirmed at an extraordinary general meeting of the company on September 28, 1949.

Early in 1950 the plaintiff brought proceedings claiming damages for wrongful dismissal on the ground that he was removed from being managing director without notice.

Held (affirming Harman J.), that as there was no service agreement entitling the plaintiff to notice, his tenancy of the office of managing director could under art. 68 be determined ipso facto by resolution of the company in general meeting without notice.

Beattie v. E. & F. Beattie Ltd. [1938] Ch. 708; *Nelson v. James Nelson & Sons Ltd.* [1914] 2 K.B. 770; *Southern Foundries (1926) Ltd. v. Shirlaw* [1940] A.C. 701, and *James v. Thomas H. Kent & Co.* [1951] 1 K.B. 551, distinguished.

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APPEAL from Harman J.

The defendant company was a private company promoted by the plaintiff, Horace Charles Read, in 1932 to carry on a garage business. The capital was originally £2,000 in £1 shares, later increased to £3,000 in £1 shares and at all material times the plaintiff was the holder of 800 shares. Under the articles of the company the plaintiff was appointed a permanent director and chairman of the company.

The company adopted as their articles of association Table A of Sch. I to the Companies Act, 1929, with certain modifications. Art. 68 of Table A provides: "The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration . . . as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination ipso facto if he ceases for any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

At the first meeting of the directors on January 29, 1932, the plaintiff was appointed managing director at a salary of £7, a salary later increased to £8 a week and then to £16 a week.

In 1948 the company began to do badly. The plaintiff was a sick man, with the result that his services to the company deteriorated and that he had overdrawn on his salary. At an extraordinary general meeting of the company held on June 30, 1948, a resolution was passed on a show of hands altering the articles so as to remove the plaintiff from the office of chairman of the company.

On March 15, 1949, the directors decided to relieve the plaintiff of his position as managing director and gave him "two months' leave on full pay." Since that date he had done no work for the company. On May 11, 1949, the directors resolved that the plaintiff's employment with the company be terminated on May 13, 1949, and the secretary was instructed to send him one month's notice. In fact the plaintiff received four months' salary after that date. At an extraordinary general meeting of the company held on September 28, 1949, a resolution was passed by poll approving the action of the directors in removing the plaintiff from his post as managing director.

Early in 1950 the plaintiff brought proceedings asking for a declaration that he was still chairman of the company and he claimed damages for wrongful dismissal from his position of managing director without notice. The question whether the plaintiff was still chairman of the company was a pure question of fact and does not call for report.

Harman J. held that the company was entitled under art. 68 to dismiss the plaintiff out of hand from being managing director and not to give him any notice, but that if he had had to determine the notice he would have said that three months' notice would have sufficed and the plaintiff had in fact received six months' salary without doing any work.

The plaintiff appealed.

Harold Brown for the plaintiff. The plaintiff was dismissed from his office of managing director without there being any misconduct on his part on which his dismissal could be based. He is therefore entitled to damages for wrongful dismissal without notice.

[JENKINS L.J. When there is no service agreement a managing director can, under art. 68 of Table A, be dismissed summarily by the company in general meeting. [He referred to *Southern Foundries* (1926) *Ld. v. Shirlaw*.¹]]

That case is not really in point here. *Beattie v. E. & F. Beattie Ltd.*² assists the plaintiff's claim. There was in truth what amounted to a service agreement in the present case.

[JENKINS L.J. The plaintiff was appointed managing director at a salary, but there was no contract of service expressing the terms of service.]

It is submitted that on a general appointment made without reference to art. 68 the rights of the managing director are unaffected by the article.

[MORRIS L.J. If the company is acting under art. 68, can it possibly do anything contrary thereto?]

The words in art. 68 as to the appointment being "subject to determination ipso facto" cannot mean that the company in general meeting could determine the appointment of a managing director immediately after his appointment: *Nelson v. James Nelson & Sons Ltd.*³ It cannot be true as *Swinfen Eady* L.J. there said that under art. 68 the directors could only appoint a managing director subject to the right of the company in

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general meeting to remove him at any time. They cannot be entitled to remove him without giving notice. [He referred also to *James v. Thomas H. Kent & Co.*⁴]

John Bradburn for the defendant company was not called upon.

JENKINS L.J. This is an appeal from a judgment of Harman J. dismissing claims by the plaintiff, a Mr. Read, against a company called Astoria Garage (Streatham) Ltd. The claims made concerned, in the first place, the removal of the plaintiff from the office of chairman of the company, which he held under a special provision in the company's articles of association; and, secondly, the alleged wrongful dismissal of the plaintiff from the office of managing director of the company effected by a resolution of the company dated September 28, 1949.

[His Lordship then dealt with the first point and continued:] There remains the second point—the claim in respect of the alleged wrongful dismissal of the plaintiff from his office of managing director. There is no record anywhere of any terms on which the plaintiff was appointed managing director beyond the minute of resolution No. 4 which was passed at the first meeting of the directors by which the plaintiff was appointed managing director at a salary of £7 a week from February 1, 1932, and the articles of association of the company. The company's articles adopted Table "A," with certain modifications. Amongst the articles of Table A adopted was article No. 68. [His Lordship read the article.]

It is argued by Mr. Harold Brown for the plaintiff that, notwithstanding the provisions of article 68, there was a contract between the plaintiff and the defendant company in the nature of a contract of general hiring—a plain contract of employment, one of the terms of which was that the plaintiff's employment should not be determined by the defendant company except by reasonable notice. The judge came to the conclusion that the terms of the plaintiff's appointment were not such as to entitle him to any notice in the event of the company choosing under article 68 to resolve in general meeting that his tenure of office as managing director be determined, and, in my judgment, the judge was clearly right.

Mr. Harold Brown put his case in two ways; he called our attention to *Beattie v. E. & F. Beattie Ltd.*,⁵ a case in which it was held that a provision in the articles of a company providing

⁴ [1951] 1 K.B. 551.

⁵ [1938] Ch. 708.

that all disputes between the company and its members should be submitted to arbitration had no contractual effect, and therefore was not a written agreement for submission to arbitration within section 4 of the Arbitration Act, 1889. That case proceeded on the principle that the contractual force of articles of association under the Companies Act only extends to the rights and liabilities of members in their capacity as members, and that provisions as to other matters outside that field of rights and liabilities have no contractual effect. Mr. Harold Brown has asked us to adduce from this that in considering the rights of the plaintiff as managing director the existence and terms of article 68 of Table "A" must be ignored. With all respect to Mr. Harold Brown, I find it impossible to follow that argument. The principle stated in the *Beattie* case,⁵ I think, really comes to no more than this—to take an example germane to this case—that if there was a provision in the articles of association of a company to the effect that AB should be managing director at a salary of £x per annum, and there was no contract with AB apart from that provision in the articles, then the mere fact that the articles purported thus to appoint AB as managing director would not of itself constitute a contract between him and the company on which he could sue.

I fail to see how that principle can assist the plaintiff here. The directors purported by a resolution of the board to appoint him managing director. In my view, it is really clear beyond argument that the directors must be taken to have been making that appointment with reference to the provisions of article 68 of Table "A"—it was only under that article that they could make the appointment. Accordingly, in my view, the resolution, containing as it did no other special terms beyond the fixing of the remuneration of £7 a week, and containing nothing whatever amplifying, or inconsistent with, the provisions of article 68, must be taken to have been an appointment of the plaintiff as managing director on the terms of article 68, and accordingly it was an appointment upon terms, *inter alia*, that it should be subject to termination if the company in general meeting resolved that the plaintiff's tenure of the office of managing director be determined.

Mr. Harold Brown said alternatively that even if the appointment made by the resolution of the board must be taken as in effect incorporating the provisions of article 68, nevertheless the

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provisions of the article as so incorporated must be held to be subject to an implied term that the plaintiff's employment could not be determined without reasonable notice. For my part, I see no ground for implying any such term; indeed, to imply one really comes back to saying over again that the appointment was not on the terms of article 68, but on some other and different terms, including a term as to reasonable notice. I see no ground for implying any such term in the absence of any contract outside the article and the resolution, and in the absence, moreover, of any provision about it at all in the resolution itself.

We were referred to various authorities on this topic which, in one form or another, has been fairly often before the courts. The first was the well-known case of *Nelson v. James Nelson & Sons Ltd.*⁶ In that case the headnote is: "The articles "of association of the defendant company provided that the "board of directors might appoint one of their number to be "managing director for such period as they deemed fit, and "might revoke the appointment. The board appointed the "plaintiff to be managing director upon the terms of an agree- "ment which provided that he should hold the office so long as "he should remain a director of the company and retain his due "qualification and efficiently perform the duties of the office. "Subsequently, while the plaintiff was still fulfilling the condi- "tions of the agreement, the board revoked the appointment. "The plaintiff sued the company for damages for breach of "agreement:—*Held*, that the articles of association did not "empower the board to revoke the appointment at will, or other- "wise than in accordance with the terms of the agreement under "which the plaintiff was appointed managing director, and that "the plaintiff was entitled to recover damages against the "company."

It is to be observed that this was a case in which there was an actual agreement with the plaintiff that he should be managing director for a period which was inconsistent with the unfettered exercise by the directors of their power under the articles to revoke the appointment of a managing director; and it seems to me that this is a vital distinction from the present case, in which there is no vestige of any contract beyond the minute of the resolution making the appointment and the article by reference to which, in my view, the appointment was made. The learned judge referred in the course of his judgment to a passage in the

⁶ [1914] 2 K.B. 770.

judgment of Swinfen Eady L.J. in the *Nelson* case⁶ in which he drew a distinction between a case like the one there under consideration, where the directors were seeking to exercise a power to revoke an appointment, and a case where the appointment of a managing director is, as in the present case, made subject to a power for the company to deal with it in general meeting; and the Lord Justice, after referring to that kind of article, continued⁷:

"With an article in that form it is manifest that the directors can only appoint a managing director subject to the right of the company in general meeting to resolve at any time that his tenure of the office of managing director is to be determined. That, however, is not the article which we have to construe."

It will be seen that the learned Lord Justice was there recognizing that where a company in general meeting reserves the right to determine the appointment of a managing director, the directors cannot by the appointment of a managing director for some fixed term, override that power in the company. At all events, I think it is plain that where there is an article in that form, a managing director, whose appointment is determined by the company in general meeting in exercise of that power, cannot claim to have been wrongfully dismissed unless he can show that an agreement has been entered into between himself and the company, the terms of which are inconsistent with the exercise by the company of the power conferred on it by the article to determine a managing director's appointment in general meeting. In the present case, as I have said before, there is no evidence of the existence of any such contract.

We were also referred to the case in the House of Lords of *Southern Foundries Ltd. (1926) v. Shirlaw*.⁸ In that case the majority of their Lordships held the managing director concerned to be entitled to damages. That is, however, an entirely different case from the present one for two reasons. In the first place, there was a contract of service between the company and the managing director dehors the articles of association; and, in the second place, the contract was sought to be determined by a power not present in the articles of association of the company as they stood at the date of the contract, but a power inserted in the articles by subsequent alteration. In my view, therefore, the case was wholly different from the present case, and it does not seem to me that any assistance can be obtained from it for the present purpose.

⁶ [1914] 2 K.B. 770.

⁷ Ibid. 779.

⁸ [1940] A.C. 701.

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Lastly, we were referred to *James v. Thomas H. Kent & Co.*,⁹ on which some reliance was placed by Mr. Harold Brown. It was a rather curious case which was decided in this court. Very briefly, the facts were that on June 17, 1946, the plaintiff was appointed by a meeting of the members of the company to be a first director of the company "subject to a three-year contract" "with the company" at a specified salary. The only record of that appointment consisted of the minutes of the meeting of the members of the company; no written agreement was ever entered into. Some time later there was trouble between the plaintiff and the company, and the plaintiff was dismissed; he sued for wrongful dismissal, and he put his claim alternatively as a claim for the balance of salary alleged to be due to him or a claim for damages for wrongful dismissal. The conclusions of the court in that case were as stated in the headnote: "(1) That "the entry in the company's minute book of the plaintiff's "appointment was not a sufficient note or memorandum to "satisfy the Statute of Frauds; (2) that, the alleged agreement "being an oral agreement, no action on it would lie, and there- "fore the plaintiff could not sue for wrongful dismissal; (3) that, "there being an existing contract, no other contract could be "implied on which the action could be based; but (4) that, as it "appeared that there never was any express contract, a contract "could be implied, one of its terms being that it could be ter- "minated by reasonable notice, which, as found by the trial "judge, would be three months; and (5) that the plaintiff could "recover on this implied contract though it had never been "pleaded or relied on in the court below."

Mr. Harold Brown says that the fourth of those findings assists him in the present case; he says that there was here no express written contract, but that a contract could be implied, one of its terms being that it could be terminated by reasonable notice. At first sight that argument does seem to assist his case, but on looking into the judgments, I find that the decision in *James v. Thomas H. Kent & Co.*⁹ has no bearing on the effect of provisions in the articles of association of a company in regard to the tenure of the office of director or managing director. The contract upon which the plaintiff sought to sue was a contract appointing him a director for a period of three years at a specified salary. That being a contract not to be performed within the year, it was held that if there was a concluded oral agreement to

⁹ [1951] 1 K.B. 551.

the effect claimed, no action upon it would lie, on the ground that the minute recording it was not a sufficient note or memorandum to satisfy the Statute of Frauds. But it was held further that there was no concluded oral agreement inasmuch as the arrangement recorded in the minute was expressed to be "subject to a three-year contract with the company." In these circumstances, the plaintiff was treated simply as a salaried employee under a service agreement to be implied from the fact that he had been performing services at a salary, although the agreement actually sought to be enforced, if it had been a concluded agreement, would have been unenforceable for want of writing. Accordingly, it does not seem to me that *James v. Thomas H. Kent & Co.*⁹ assists the plaintiff in the present case.

In my view, on the facts of this case, the position was simply that the plaintiff was appointed to be managing director in accordance with article 68 of the 1929 Table "A" with such tenure of office as was provided for by that article, and had no special right to receive any particular notice of the termination of his employment in the event of the company deciding to determine it and doing so by a resolution in general meeting. Accordingly, in my view, the learned judge came to a right conclusion on the plaintiff's second claim; and in the result the appeal fails on both points, and should be dismissed.

MORRIS L.J. I agree fully with the judgment which my Lord has given, and I do not feel that I could usefully add anything to what my Lord has said.

Appeal dismissed.

Solicitors: *William Foux & Co.; Mawby, Barrie & Letts.*

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⁹ [1951] 1 K.B. 551.

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[1952 D. No. 965.]

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21, 22.

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Tort—Procurement of breach of contract—Trade dispute—Trade unionists called on by defendants not to handle goods for plaintiffs—Third party's contract with plaintiffs broken—Whether plaintiffs entitled to interlocutory injunction—Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 3.

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June 16, 17,
18, 19, 20,
23, 24, 25,
26.Evershed M.R.,
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The plaintiffs were printers and publishers of periodicals employing non-union labour. The paper they used was supplied under a contract by Bowaters Sales Ltd. The plaintiffs, having dismissed one of the workmen, who had become a member of the National Society of Operative Printers and Assistants, commonly known as "Natsopa," that union on April 19, 1952, called out on strike its members who were employees of the plaintiffs. At the same time officials of Natsopa called on other unions to support them. Thereupon Bowaters' drivers, who were members of the Transport and General Workers Union, informed Bowaters on Friday, April 25, that they might not be prepared to deliver the paper to the plaintiffs which was due for delivery the following Monday. The loaders, who were members of the National Union of Printers, Bookbinders and Paperworkers, also informed Bowaters that they might not be prepared to load paper for delivery to the plaintiffs. Bowaters never required the loaders to load or their drivers to deliver paper to the plaintiffs but informed the plaintiffs that they would not be able to deliver paper in accordance with their contract. No paper was in fact delivered after April 28. In this action the plaintiffs sought, inter alia, an injunction to restrain the defendants, who were officers of the several unions concerned, either themselves or by their servants or agents to do any act with a view to procuring any breach by Bowaters of their contract with the plaintiffs to supply them with paper or other goods. By this motion the plaintiffs sought an interlocutory injunction in similar terms. The plaintiffs conceded for the purposes of the motion that the defendants had not entered into any conspiracy directed to injure the plaintiffs within the principle of *Sorrell v. Smith* [1925] A.C. 700. Upjohn J. dismissed the motion.

On appeal:—

Held that, apart from a conspiracy to injure, which was not in question here, acts of a third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they are done with the object and intent of bringing about such breach. The tort of procuring a breach of contract however is not confined to direct intervention. The intervener knowing of the existence of a contract between A and B and acting with the object of procuring its breach by A to the damage of B will be liable not only (1) if he

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directly intervenes by persuading A to break it, but also (2) if he intervenes by the commission of some act wrongful in itself so as to prevent A from in fact performing his contract and also (3) if he persuades a third party to do an act in itself wrongful or not legitimate (as committing a breach of a contract of service with A) so as to render, as was intended, impossible A's performance of his contract with B.

In principle an actionable interference with contractual relations by persuading the servants of one of the parties to the contract to break his contract of service with that party is confined to the case where it is clearly shown; first, that the person charged with actionable interference knew of the existence of the contract and intended to procure its breach; secondly, that the person so charged did definitely and unequivocally persuade, induce or procure the employees concerned to break their contracts of employment with intent to procure the breach of the contract; thirdly, that the employees so persuaded, induced or procured did in fact break their contracts of employment; and fourthly, that the breach of the contract forming the alleged subject of interference ensued as a necessary consequence of the breaches by the employees concerned of their contracts of employment. For the fourth requirement to be satisfied, it must be shown that by reason of the withdrawal of the services of the employees concerned the contract breaker was unable as a matter of practical possibility to perform his contract.

In the case of a company, the approach to or persuasion of a managing director or some person having like authority may be regarded as being in all respects equivalent to a direct approach to or persuasion of an individual contractor but, if the approach is made to other servants of a company, the case is parallel to an approach to or persuasion of some servant of the contracting party, so that the intervener will only be liable if the act which he procures the servant to do is either a breach of contract towards the servant's master or is otherwise tortious in itself.

The evidence did not establish that there had been any direct procurement by the defendants of any wrongful acts by the employees of Bowaters or that there were in fact any wrongful acts by Bowaters' employees. Further, there was no evidence of any actual knowledge by the defendants of any contract between Bowaters and the plaintiffs. Accordingly, the plaintiffs were not entitled to an interlocutory injunction.

Lumley v. Gye (1853) 2 E. & B. 216; *Allen v. Flood* [1898] A.C. 1 followed.

The observations of Lord Macnaghten and Lord Lindley in *Quinn v. Leatham* [1901] A.C. 495, 510, 535, and of Lord Simon L.C. in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch* [1942] A.C. 435, 442 considered and explained.

Per Evershed M.R.: *Semble* that had the plaintiffs proved themselves otherwise entitled to relief, section 3 of the Trades Disputes Act, 1906, would not have prevented the granting of an injunction.

Decision of Upjohn J. affirmed.

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The plaintiffs were D. C. Thomson & Co. Ltd., a limited company carrying on business in Dundee, Manchester, Glasgow and London as owners, printers, publishers and sellers of a large number of newspapers and periodicals. The defendants were Mr. Arthur Deakin, general secretary of the Transport and General Workers' Union, Mr. John Wood and Mr. C. E. Intin, the trade group secretary and regional secretary respectively of the union, Mr. Richard W. Briginshaw, general secretary of the National Society of Operative Printers and Assistants, and Mr. W. A. Morrison, secretary of the National Union of Printing, Book-binding and Paper Workers.

The plaintiffs by this motion asked for interlocutory injunctions to restrain the defendants from doing any further act, whether by themselves, their agents or workmen, with a view to causing or procuring a breach or breaches by Bowaters Sales Ltd., of Park Place, St. James's, London, or any other company, firm or person of any contract between the plaintiffs and Bowaters Sales Ltd., or such other company, firm, or person, for the supply of newsprint or any other goods whatsoever to the plaintiffs. On May 9, 1952, an injunction had been granted *ex parte* on the application of the plaintiffs against the first four defendants, and another had been granted against the fifth defendant on May 13, 1952.

Since the General Strike of 1926 the plaintiffs had employed only non-union labour, and every person on becoming an employee of the plaintiffs had to sign a document in these terms: "Dear Sir, I undertake not to become a member of any union as long as "I am in your employment. Yours faithfully."

This requirement on the part of the plaintiffs had long angered the defendant Briginshaw, the secretary of the National Society of Operative Printers and Assistants, usually referred to as "Natsopa." He held the view very strongly that this requirement was wrong and violated what he conceived to be a fundamental trade union principle, namely, that every worker should be free to choose whether or not to join a trade union.

In March, 1952, there was a dispute between the plaintiffs and one McKay, an employee of the plaintiffs of some 30 years standing, as a result of which McKay left the plaintiffs' employment on March 20 or 21. Whether he left voluntarily or was dismissed was a fact in issue, but was not relevant on this motion.

Notwithstanding that McKay had signed a document in the

terms mentioned, undertaking not to join a trade union, unknown to the plaintiffs he had done so by joining Natsopa in August, 1939. Conceiving that he had some grievance over this dispute, he consulted Natsopa and on the instructions of the executive council of that body, given on April 7 and 8 of this year, the defendant Briginshaw went to the plaintiffs' works at Glasgow. He was accompanied by the defendant Moncrieff, the Northern District secretary of Natsopa, and endeavoured twice to see the plaintiffs' manager, but he was unsuccessful. According to Briginshaw's affidavit, he ascertained that the feeling of the members of Natsopa employed by the plaintiffs was in favour of strike action to enforce the principle of the right of employees to trade union membership, and on the night shift of April 19 between 70 and 80 of the employees of the plaintiffs, apparently secretly members of Natsopa, failed to report for work and were thereupon dismissed.

Natsopa having decided to make an issue of this matter, Briginshaw, the general secretary, made many appeals to help his union in what he described as the union's fight against the plaintiffs in defence of the right of the worker to join the union of his choice. Many such appeals were made by himself and Moncrieff.

A statement dated April 21, signed by Briginshaw and addressed to all fathers of chapels and members of chapels said: " This is not just a small dispute but a fight on the fundamental principle of the right to belong to a trade union without being dismissed. It has fallen to the lot and honour of Natsopa to be the spearhead of a fight, we believe, the whole trade union movement throughout the country will now take up. On March 21, our F.O.C., James McKay, 31 years an employee of D. C. Thomson's, was dismissed without reason. Other members had been requested by managerial representatives that if they were members of a trade union they should immediately resign, or be dismissed. Your executive decided to accept this challenge. Under instructions of the executive council a meeting of our members in this firm was called that evening. They decided by unanimous vote to strike. They have the full backing of the executive council and a generous dispute benefit is being paid to them. We in turn have the full support of the Printing and Kindred Trades Federation, and, as a result of a unanimous resolution of the T.U.C. at Blackpool on this matter last year, we are assured of the full support of the T.U.C. This will be

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"no easy struggle. It will be costly to us and, in order to strengthen the fight, I have authorized the Central Strike Committee, under the chairmanship of the district officer, Mr. L. Moncrieff, to open a dispute fund in Glasgow."

A little later he sent out the circular which said: "National Society of Operative Printers and Assistants v. D. C. Thomson & Co. Ltd. This leaflet is issued with the full support of the executive council of Natsopa, and our strike action is also approved by the Printing and Kindred Trades Federation. . . . Natsopa's quarrel with Thomson's is entirely that. All we ask is that this dreadful relic of the past"—that was, the requirement that employees should be members of no union—"be abolished and his employees be given the freedom to belong to a union if they wish. We think this a fair and reasonable proposition. We therefore appeal to our colleagues for their active support to the fullest extent with a view to stopping the handling of Thomson's supplies and the purchasing of his publications so far as possible."

Briginshaw exhibited to his own affidavit statements or circulars which he had sent round in support of the fight to the same effect.

The following press statements, among others, were issued: "We declare the firm of D. C. Thomson, printers and publishers, to be 'black' to every trade unionist in Britain, and in accordance with the unanimous resolution of the Trades Union Congress at Blackpool on this matter last year, we expect the full support of every affiliated trade unionist in our fight for right of Britons to be free." "Tremendous response from the whole of the trade union movement all over the country following appeal for support for Natsopa D. C. Thomson strikers, who are striking for the right to belong to a trade union. . . . Transport and General Workers' Union, Salford, Manchester, stopped transport of paper for D. C. Thomson from docks this afternoon."

A letter, dated April 30, signed by the defendant Briginshaw, and addressed to the General Secretaries of all National Unions, said: "Dear Sir and Brother, re D. C. Thomson—Dundee, Glasgow and Manchester. You will no doubt be aware that a dispute is in operation between our Society and Messrs. D. C. Thomson-Leng, of Dundee, Glasgow and Manchester. It is, however, not just another trade dispute, which under normal circumstances each of us can take care of within our own

“spheres and by our own efforts. This firm has thumbed its nose at the whole trade union movement since 1926, and bluntly we have decided to take them on. We have no illusions that the issues involved are small; they are not. They are, in fact, fundamental to our movement and country. We, therefore, cannot fail to win this struggle. The Thomson-Leng concern is not small, but a powerful financial set-up, publishing 16 million copies of various papers each week. The issue is the right to belong to a trade union without immediate dismissal for so doing. . . . Wherever your organization can give direct assistance we shall be pleased if they will do so.” A letter in similar terms was written to the secretaries of trade councils.

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In a letter written on May 9, 1952, to all fathers of chapels and members of chapels, Briginshaw said: “It is perhaps early yet to thank our members for their work so far, but I must let you know how amidst terrific work pressure in this dispute I have been sustained, and inspired, by the efforts of all concerned. We have a wonderful campaign machine working. Our objective is to win this struggle with D. C. Thomson.”

On May 4, 1952, the defendant Briginshaw made a speech in Dundee, in which the following passages occurred: “I say to D. C. Thomson’s that they can never freely make their choice while a written undertaking forswearing trade unionism known as the document exists. Now, up and down the country, there is a terrific mass movement taking place, a solidarity among the trade unionists of the country, who are absolutely determined that this state of affairs shall end. Railwaymen, transport workers, miners, paper workers, printers, all are absolutely united in their effort to see that this prevention of the rights of the individual is ended. They are stopping supplies of materials. They are stopping paper, and, where he gets papers out, we are stopping them being delivered. Ink is being stopped; everything that can be done to bring home clearly and unmistakably to the firm of D. C. Thomson that no longer can this go on is now in operation.”

Later he said: “The wholesalers, the 140,000 strong Paper Workers’ Union, are refusing to handle his publications.”

In his affidavit, the defendant Briginshaw did not admit the accuracy of the report of his speech on May 4, 1952, but he did not deny that he made the speech.

The defendant Moncreiff made similar exhortations.

As the result of the appeals of the officers of Natsopa, the

Bowaters did not call on their loaders or drivers to load or drive paper to the plaintiffs, but on May 6 their managing director wrote to the plaintiffs in the following terms: “. . . We are “prevented from performing our contract by the action of the “trade unions which has put a stop to any of your paper being “loaded at and delivered from Bowater Mersey Paper Mills, “Ellesmere Port. We anticipate that this pressure will continue “and may increase, and until withdrawn we shall be unable to “make deliveries under the contract.” After April 28 Bowaters had delivered no paper to the plaintiffs.

Beyfus Q.C., Wilfrid Hunt, Dunbar Van Oss and Patrick Bennett for the plaintiffs. The plaintiffs are entitled to continuance of the injunctions if they can establish a prima facie case that there is a threat by the defendants to commit procurement of breach of contract. To constitute procurement of breach of contract the plaintiffs must show that the defendants not only procured breach of their contracts but that they have done so knowingly and intentionally: see *White v. Riley*¹; and that they have acted without justification: see *Glamorgan Coal Co. Ltd. v. South Wales Miners' Federation*.² [He also referred to *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*.³] The authorities on this question were exhaustively reviewed by Roxburgh J. in *British Motor Trade Association v. Salvadori*.⁴

The evidence shows that the aim of the defendants' activities was to prevent any supplies reaching the plaintiffs so as to cause them to capitulate. The defendants could not fail to be aware that that was bound to cause a breach of contract between Bowaters and the plaintiffs. It has already had that effect, and unless prevented by the court will continue. If the plaintiffs can establish that there is a threat of a complete or partial withdrawal of labour relating to their supplies, and which the union officials

¹ [1921] 1 Ch. 1.

² [1903] 2 K.B. 545.

³ [1942] A.C. 435.

⁴ [1949] Ch. 556.

or the employees concerned must have realized would lead to a breach of the plaintiffs' contract, then they are entitled to an injunction. It is submitted that they have succeeded in establishing this and are therefore entitled to the injunctions sought.

The plaintiffs are prepared, on the motion, to admit that there is a dispute within the meaning of section 3 of the Trade Disputes Act, 1906. And on the motion they admit that the conspiracy alleged between the defendants was to further their own interest and not to injure the plaintiffs: see *Sorrell v. Smith*.⁵

It is vital to the plaintiffs that the injunctions should continue to trial; but it matters little to the defendants. Having established that a threat to procure breach of contract exists, they should be granted an injunction.

Gerald Gardiner Q.C. and M. R. Nicholas for the defendant Deakin. The plaintiffs' argument was that if there was a threat of a complete or partial withdrawal of labour in circumstances in which employees must realize that it was likely to lead to a breach of Thomson's contract that amounted to the tort of knowingly and wilfully inducing breach of contract. If that argument were right most of the cases should have been decided the other way. There was no distinction between this case and *Dallimore v. Williams*.⁶ [He referred to *Hodges v. Webb*,⁷ *White v. Riley*⁸ and *Sorrell v. Smith*.⁹] The only case in which the present point was argued was *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*,¹⁰ but in that case it was treated very briefly in the speeches.

It was not an accurate statement of law to say that when employees or union officials threatened a complete or partial withdrawal of labour, they committed the tort of wilfully and knowingly inducing employers to commit a breach of contract, even though reasonable men would know that it was likely to result in a breach of contract.

Assuming for this purpose that the plaintiffs' evidence were true and there was no evidence in answer, it was not knowingly and wilfully inducing breach of contract if they did not know what the contract was. These defendants must have known that there was an existing contract between Thomson's and Bowaters, and failure to deliver paper might result in breach of that contract—the plaintiffs were able to say that the defendants took no steps

⁵ [1925] A.C. 700

⁶ (1912) 29 T.L.R. 67; (1914) 30 T.L.R. 432.

⁷ [1920] 2 Ch. 70.

⁸ [1921] 1 Ch. 1.

⁹ [1925] A.C. 700.

¹⁰ [1942] A.C. 435.

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The tort of inducing a breach of contract must be committed wilfully. What the defendants wanted to do was to stop supplies to the plaintiffs, they did not wish to induce breach of contract. In cases of procuring breaches of contracts of service it was not necessary to prove that the defendants knew of the terms of the contracts. But the reason for that was historical: see *British Industrial Plastics Ltd. v. Ferguson*¹¹ and *British Homophone Ltd. v. Kunz*.¹² [Counsel referred to sections 1 and 3 of the Trade Disputes Act, 1906.] It is desired to keep open a point under section 4, though that point would not be argued now. The tort in question had always been defined as being committed only if done without just cause or excuse: see *Glamorgan Coal Co. Ltd. v. South Wales Miners' Federation*.¹³ This is not a case in which an interlocutory injunction should be granted.

Sir Hartley Shawcross Q.C. and *I. J. Lindner* for the defendants Briginshaw and Moncrieff. No precedent as to the terms of such an injunction is known, because no injunction has ever been granted in cases of inducement to break contracts.

The issues involved are quite clear: (1) was there a procurement of breach of contract in the sense that that was understood in law, and, if so, was there a procurement by any of the defendants; and (2) if there was a procurement, was it illegal? The matter was one of fundamental importance in the law of trade unions, and there is the question whether in the circumstances an interlocutory injunction should be granted.

If the plaintiffs were right there would be very considerable restriction on what was known as the right to strike. There never had been a strike which had not led to breach of contract, and if they were right it would be very difficult to see what was left of the right to strike.

The defendants maintained that they were entitled peacefully to persuade the plaintiffs' employees to strike, even if it resulted in breach of contract. Secondly, they were entitled to urge other trade unions to support them, and thus indirectly to bring pressure to bear on the plaintiffs. There was a distinction between threats of withdrawal of labour and partial or total cessation of labour.

There was not much authority on the question of procurement in law. Merely to render the performance of a contract impossible was not to procure its breach. It was some act of persuasion more

¹¹ (1940) 162 L.T. 313.

¹³ [1903] 2 K.B. 545.

¹² (1935) 152 L.T. 589.

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than mere advice. It must be something in the nature of an attempt, a forceful attempt, to persuade another party not to carry out his contract: see Clerk and Lindsell on Tort, 10th ed., p. 320. There must be procurement of a breach which went to the root of the contract: see *De Jetley Marks v. Lord Greenwood*¹⁴ and *Hand Woven Harris Tweed Co. Ltd. v. Veitch*.¹⁵ There is no evidence that these defendants had any knowledge of Bowaters' contract, and to commit the tort of procurement of breach of contract it is necessary to see what the contract was. Nothing was done to induce Bowaters to break their contract. But, assuming that there was procurement, the question was then whether it was unlawful. [He referred to Slessor on Trade Union Law, 3rd ed., p. 259; Salmond on Torts, 7th ed., p. 364.]

There are two limbs of section 3 of the Trade Disputes Act, 1906.¹⁶ The first was to afford protection against breach of contract to those who went out on strike; that part of the section became necessary because of *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*¹⁷ and *Glamorgan Coal Co. Ltd. v. South Wales Miners' Federation*.¹⁸ The second limb was much wider in its effect. Mere interference with the trade or business of another was not actionable at common law unless unlawful means were employed: *Allen v. Flood*.¹⁹ [He also referred to *Brimelow v. Casson*²⁰ and *Royal London Mutual Insurance Society Ltd. v. Williamson*.²¹]

Even if the court are against me on all points, the court should not grant an interlocutory injunction. The effect of such an injunction would be to tie the hands of union officials, who had coped successfully with attempts to disrupt the unions by unofficial action.

Sir Frank Soskice Q.C. and *John Thompson* for the defendant Morrison. The effect of the evidence against this defendant, at its highest, amounted to this: between May 8 and May 15 a circular had been on its way round the branches; it might have gone to the Ellesmere Port branch. It was possible, or even probable, that newsprint loaders who were members of the Paper Workers'

¹⁴ [1936] 1 All E.R. 863.

¹⁵ [1942] A.C. 432.

¹⁶ The Trade Disputes Act, 1906, s. 3: "an act done by a person in . . . furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or

employment of some other person, or with the right of some other person to dispose of his . . . labour as he will."

¹⁷ [1901] A.C. 435.

¹⁸ [1903] 2 K.B. 545.

¹⁹ [1898] A.C. 1.

²⁰ [1924] 1 Ch. 302.

²¹ (1921) 37 T.L.R. 742.

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Union and had withdrawn their labour saw the circular and were fortified in their purpose of continuing to decline to load newsprint destined for the plaintiff company at Manchester. The burden of proof was on the plaintiffs, who had not shown that by those dates Mr. Morrison had the remotest knowledge of what was the contractual relationship between Bowaters and the plaintiffs.

The defendants contended that in order to establish the tort of procuring breach of contract, there had to be something in the nature of a positive and deliberate inducement to break a known contract. The dictum in *White v. Riley*²² should be borne in mind, and, applying that statement to the evidence, it could not conceivably be said that Mr. Morrison intended to bring about a breach of contract. If he were guilty of a tortious act, equally so, and a fortiori, were the loaders. If the paper loaders were not loading, Mr. Morrison was not doing any harm merely by telling them not to load. Even if this action were framed on the principle laid down by Lord Atkin in *Donoghue v. Stevenson*,²³ it would fail; it really raised the question whether one could strike or not. *British Motor Trade Association v. Salvadori*²⁴ was distinguishable from the present case because there was not here any proof of actively facilitating a breach of contract, which was what Roxburgh J. had found in that case.

Beyfus Q.C. in reply. The defendants have committed a deliberate and intentional interruption of contractual relations. It was irrelevant whether the means used to procure a breach of contract were legal or illegal. [He referred to *British Motor Trade Association v. Salvadori*²⁴ and *Glamorgan Coal Co. Ltd. v. South Wales Miners' Federation*.²⁵] It was nonsense to suggest that the defendants did not know that they were causing a breach of contractual relations; when they instructed drivers not to drive lorries loaded with newsprint for the plaintiffs, they must have realized that it would result in a breach; and it was absurd to suggest that they must know of every term in a contract. If a prima facie case be shown an injunction should be granted, otherwise D. C. Thomson & Co. Ltd. might come to an end before the action came to trial.

Cur. adv. vult.

UPJOHN J., reading his judgment, stated the facts and continued:—I must mention one principle on which the court acts on motion. Where there is a conflict of evidence, the court

²² [1921] 1 Ch. 1, 16.

²³ [1932] A.C. 562.

²⁴ [1949] Ch. 556.

²⁵ [1903] 2 K.B. 545.

is unable on motion to decide which evidence is to be preferred, that is naturally a matter which must wait till the trial of the action, when witnesses give evidence on oath in the witness box and the court can determine where the truth lies.

In this case I am satisfied that the plaintiffs will suffer grave and irreparable loss if the injunction sought be not granted until judgment. If they cannot obtain supplies of paper, they will be unable to continue publication of their newspapers and periodicals for some weeks, or possibly months, until the action is tried, or can only do so on a reduced scale, and they will thereby run the risk of losing readers, some of them permanently, and so lose the whole or a great deal of their goodwill. That is a matter which cannot be adequately compensated for in damages either by the defendants or even by Bowaters, assuming that the latter are liable.

This is a very important consideration, but, in my judgment, it does not entitle the court to reject the defendants' evidence where it conflicts with that of the plaintiffs and to decide the motion solely on the plaintiffs' evidence. I must still take into account the defendants' sworn affidavit evidence, leaving it to the trial judge to ascertain ultimately where the truth lies.

Having in mind this principle, the evidence in my judgment amounts to this. As a result of the exhortations of the defendants Briginshaw and Moncrieff, the defendant Deakin, the general secretary of the Transport and General Workers' Union, according to his own affidavit, on April 25, 1952, telephoned to his local official, Mr. Intin, the regional secretary, and, in his own words, asked him to give such assistance as they properly could in the Thomson-Natsopa dispute; but he states that he gave no instructions that the members of the trade union were not to handle or to move paper for delivery to the plaintiffs.

The plaintiffs placed much reliance on a letter said to be written on the defendant Deakin's instructions on April 25, 1952, but, according to his evidence, which, for the reasons which I have given, I must accept, that letter arrived too late to be an operative or effective document.

The defendant Wood, the trade group secretary of the commercial section of the Transport and General Workers' Union, who was admittedly working in close conjunction with the defendant Intin, then telephoned to a Mr. Cassidy, one of Bowaters' transport supervisors, and Mr. Wood said that, as one of the plaintiffs' works was being picketed by Natsopa and another

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1952 plaintiffs' works.

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Later the defendant Intin had a telephone conversation with Mr. Botterill, the transport manager of Bowaters, and, again, according to Mr. Intin, although the matter is in issue, he advised Mr. Botterill not to ask his men to carry anything for the plaintiffs. That seems to me to come very near to saying that the union members would not, in effect, carry a load to the plaintiffs, but (and this is an important matter) the evidence of Mr. Lloyd, the shop steward at Bowaters, does show that the actual decision not to take lorries to the plaintiffs was made locally, by the committee of union men employed at Bowaters on April 26 and not by any of the defendants. Thereafter no lorries were driven from Bowaters to the plaintiffs, nor was any paper delivered to them.

I do not propose to set out in detail the terms of the contracts between Bowaters and the plaintiffs. It is sufficient to say that the contracts were constituted by letters passing between Bowaters and the plaintiffs, and provided for the supply of newsprint over the 39th licensing period from March 3 to June 28, delivery being spread evenly over that period and made weekly. Each week an employee of the plaintiffs telephones through to Bowaters the requirements for the following week.

I am satisfied that, as a result of the action of the employees of Bowaters, who were members of the Transport and General Workers' Union, Bowaters were thereby compelled to break their contracts with the plaintiffs. It was suggested that there might be a force majeure clause in the contracts, which would prevent the failure to deliver from being a breach of contract. I reject that argument, for the letters constituting the relevant contracts, one for the supply of paper for newspapers and one for periodicals, were in evidence before me and disclosed no such clause. I also reject the argument that such a term should be implied in the contract. I see no ground for making any such implication.

It remains to consider the case of the defendant Morrison. He is secretary of the National Union of Printing, Bookbinding and Paper Workers' Union (which I shall call the Paper Workers' Union). Members of this union are responsible for loading paper on to Bowaters' vehicles. They refused to do so on May 12, 1952.

There is here, again, a complete conflict of evidence as to the part played by the defendant Morrison in achieving that result. According to him, he played no part in it at all, except to send a

circular to branches of the Paper Workers' Union on or about May 8. His counsel admitted in argument that the circular might have reached the branch at Bowaters and might have been a factor which influenced the men there to refuse to load the paper destined for the plaintiffs.

The circular, so far as relevant, was in these terms: "The whole of the unions in our own federation have pledged their solid support, and the response of the British trade unions in general has been most encouraging. In these circumstances, we obviously have to play our part. Our people employed by London and also provincial wholesale distributors will not handle any of Thomson's publications until the dispute has been settled. Our colleagues employed in paper mills making paper for Thomson's have responded magnificently."

In spite of a submission to the contrary, that seems to me a clear invitation to refuse to handle supplies intended for the plaintiffs; and in fact that is what happened at the Bowaters concern.

On May 12, as I have already pointed out, the Paper Workers' Union employees refused to handle the paper, although at that time, according to the evidence, the members of the Transport Workers' Union were willing to do so. As a result, Bowaters were, again, compelled to break their contract with plaintiffs.

The plaintiffs issued their writ on May 7, 1952, and claimed relief, asking for an injunction, damages for conspiracy to procure a breach or breaches of contract and damages for procuring a breach or breaches of contract, and ancillary relief.

I must now consider the law. This court is not concerned in any way with the merits of the dispute between the plaintiffs and Natsopa. Each side is fully at liberty to urge its own point of view: the plaintiffs to maintain their rights to employ only non-union labour; the defendants to maintain that every employee of the plaintiffs ought to be free to join the union of his choice. Further, each side is fully entitled to try to persuade the other to change its point of view, provided that no unlawful or illegal means are used. The sole concern of this court is to protect persons, if unlawful means are sought to be employed by one side or the other.

The principle is succinctly stated in the judgment of Peterson J. in *Hodges v. Webb*. He said²⁶: "In all these cases it is of the utmost importance that the court should keep in mind the fact that it is not to consider questions of policy, or whether the

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UPJOHN J. "conduct of employers on the one hand or the workmen or their
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 "expedient. The sole duty of a judge is to consider whether the
 D. C. "act complained of is lawful or unlawful; and it is well to
 THOMSON "remember the weighty words of Lord Herschell in *Allen v.*
 & Co. LD. "Flood²⁷: 'I am not behind my noble and learned friend in the
 v. "desire to preserve individual liberty. But I think it is never in
 DEAKIN. "greater danger than when a tribunal is urged to restrict liberty
 "of action because the manner in which it has been exercised in
 "a particular instance may be distasteful.' "

For the purposes of this motion the plaintiffs concede two things: first, that there is in existence a trade dispute for the purposes of section 3 of the Trade Disputes Act, 1906; secondly, that the conspiracy alleged between the defendants is a conspiracy the predominant object of which is to secure the interest of the defendants and not to injure the plaintiffs, and is not, therefore, actionable per se: see *Sorrell v. Smith*.²⁸

For the purposes of this motion, therefore, the element of conspiracy alleged to exist may be ignored; the sole question that I have to determine is whether the plaintiffs have established a prima facie case to show that the defendants or any of them are threatening and intending to commit a legal wrong against the plaintiffs, the wrong alleged being that usually known as procuring a breach of contract.

A number of authorities were cited to me to illustrate the nature of this tort, and I must refer to some of them. The first is *White v. Riley*.²⁹ The passage relied on is in the judgment of Lord Sterndale M.R., who said³⁰: "With regard to the second point"—that is, procurement of breach of contract—"it is not enough to show that the defendants have in fact procured a breach of contract. They must have done so knowingly and intentionally. It has been so stated in all the cases. In this case, as I have already said, in my opinion all parties, the employers, the plaintiff and the defendants, were of opinion that there was no breach of contract if the plaintiff received either a week's notice or a week's wages in lieu of notice."

There is a short but useful statement of the law by Lord Simon L.C. in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*,³¹ where, after giving some examples, he said³²: "(3) If 'C has an existing contract with A and B is aware of it, and if

²⁷ [1898] A.C. 1, 142.

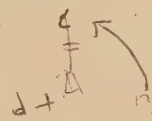
²⁸ [1925] A.C. 700.

²⁹ [1921] 1 Ch. 1.

³⁰ Ibid. 16.

³¹ [1942] A.C. 435.

³² Ibid. 442.

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"B persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act, for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract, for example, a father may persuade his daughter to break her engagement to marry a scoundrel. (This is not, of course, to say that the scoundrel would not have an action against the daughter for breach.) The father's justification arises from a moral duty to urge C that the contract should be repudiated."

Finally, the earlier authorities have been recently reviewed by Roxburgh J. in *British Motor Trade Association v. Salvadori and Others*.³³ He said³⁴: "This case necessitates a close investigation of the law relating to procurement of breaches of contract. I can start from a classic citation extracted from Lord Macnaghten's speech in *Quinn v. Leathem*³⁵: 'Speaking for myself, I have no hesitation in saying that I think the decision—that is the decision in *Lumley v. Gye*³⁶—was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with the contractual relations recognized by law if there be no sufficient justification for the interference.'"

He then considered shortly the facts relevant in that case, and certain other cases, like *Blake v. Lanyon*³⁷ and *De Francesco v. Barnum*,³⁸ and said³⁹: "I cannot doubt that Lord Macnaghten, in using the word 'interference,' had such cases in mind. Indeed, it is possible that in choosing that word for his statement of general principle he intended to make some reduction in their ambit, for those cases seem to treat something akin to mere passivity as a tort and to require active dissociation from the breach of contract, and they are still of unimpaired authority in the circumstances to which they apply and have since been followed by Joyce J. in *Wilkins Ltd. v. Weaver*.⁴⁰ But Lord Macnaghten preferred the word 'interference' for his statement of the doctrine, and this seems to me to predicate active association of some kind with the breach. But, in my judgment, any active step taken by a defendant

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³³ [1949] Ch. 556.³⁴ *Ibid.* 563.³⁵ [1901] A.C. 495, 510.³⁶ (1853) 2 El. & Bl. 216.³⁷ (1795) 6 T.R. 221.³⁸ (1890) 63 L.T. 514.³⁹ [1949] Ch. 565.⁴⁰ [1915] 84 L.J.Ch. 929.

UPJOHN J. "having knowledge of the covenant by which he facilitates a
 1952 "breach of that covenant is enough. If this be so, a defendant by
 D. C. "agreeing to buy, paying for and taking delivery of a motor car
 THOMSON "known by him to be on offer in breach of covenant, takes active
 & Co. LD. "steps by which he facilitates a breach of covenant and it is not
 v. "seriously contended that in any of the cases with which I am
 DEAKIN. "concerned the defendant did not know of the existence of the
 "covenant or thought that the covenantor had obtained a
 "release."

The plaintiffs, in order to obtain an injunction, must establish a prima facie case that the defendants are threatening and intending to commit this tort. The real question that I have to consider may be shortly stated: taking, first, the defendants Briginshaw, Moncrieff and Morrison, do their actions, which consisted in sending out circulars and making speeches in the terms which I have stated, calling on the employees of Bowaters, amongst others, to refuse to carry supplies to the plaintiffs, constitute the tort of knowingly procuring a breach of contract between the plaintiffs and Bowaters?

One must be careful to distinguish between intention and motive. It is not disputed that the motive behind the defendants' acts was that supplies to the plaintiffs should be stopped. That indeed was its very object. I will assume that the natural and probable consequence of the defendants' acts was that supplies to the plaintiffs would be stopped and even that a further natural and probable cause of such acts was that Bowaters would thereby probably be compelled to commit a breach of contract with the plaintiffs. *Is it sufficient?*

Those facts, however, in my judgment do not constitute the tort alleged. There never was any direct action between the defendants or agents on their behalf and Bowaters with the object of persuading or causing Bowaters to break their existing contracts with the plaintiffs. The defendants chose another path, and, by circulars and speeches addressed through trade union channels to the employees of Bowaters, influenced the latter to take the course of breaking their contracts of employment with Bowaters to this extent: that they refused to handle supplies intended for the plaintiffs. Whether in those circumstances the employees who broke their contracts of employment with Bowaters also committed the tort of procuring a breach of contract is not a matter with which I am concerned. Putting it at its highest against them, the defendants procured a breach of contract between

Bowaters and their own employees. That was an act made lawful by section 3 of the Trade Disputes Act, 1906.

In my judgment, the fact that the natural and probable consequence of that act is that Bowaters may be compelled to break their contracts with the plaintiffs is not sufficient to constitute the tort alleged. Nearly always withdrawal of labour, whether it be complete (for instance a strike) or partial, as in this case (that is to say, a refusal to handle particular goods) has for its object something which in the eyes of those breaking their contract of employment is calculated to improve their conditions (such as higher pay or shorter hours), or to enforce some point of view that appears to be beneficial to the trade union movement in general or to a particular trade union in any given case. That object is attained, if the strike is successful, by seriously embarrassing the employer in his business, so that he gives way to the men's demands wholly or in part. In many cases the employer is by strike action no doubt compelled to break his contract. It has never been suggested that a strike is thereby illegal, because the tort of procuring a breach of contract is thereby committed by those incited to strike.

A number of decisions were referred to, but no authority directed to this precise point was cited to me. It was argued, not without force, that it was a point that could have been raised in many cases, such, for example, as *Dallimore v. Williams*⁴¹ and *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*.⁴² It was, indeed, suggested that inferentially the point was raised and discarded in the last-mentioned case; but I do not think that that is a fair reading of that case.

I rest my decision as regards these defendants on this proposition: that they never procured Bowaters to break their contract with the plaintiffs. They exhorted Bowaters' employees to break their contracts of employment, but there never was any direct chain of causation at all between these defendants and Bowaters.

With regard to the defendants Deakin, Intin and Wood, the case is no stronger, for, accepting their evidence, as I am bound to do on motion, they never did more than "advise" the employees not to carry loads to the plaintiffs.

I must, however, deal shortly with other arguments that were presented to me. As appears from the authorities which I have cited, there may be circumstances present which justify inducing a breach of contract; for example, a father may be justified in inducing his daughter to break her contract of marriage. It was

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⁴¹ 29 T.L.R. 67; 30 T.L.R. 432.

⁴² [1942] A.C. 435.

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suggested here that there was some such justification; but the only justification was the interest of Natsopa, and that is not a justification for this purpose: see *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.*⁴³

Then it was argued that section 3 of the Trade Disputes Act, 1906, authorized the commission of the tort of procuring a breach of contract other than a contract of employment. I will read the section: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he will."

Reliance was placed on the second limb of the section. I reject that argument. In my judgment the contrast between the words of the first limb, "break a contract of employment" and the second limb, "interference with the trade, business or employment of some other person" is too strong to permit of the construction that "interference with the trade," etc., includes liberty to break any contract, whether of employment or not. Had that been the intention surely the legislature would have struck the words "of employment" out of the first limb. On this point I agree with the judgments of Russell J. in *Royal London Mutual Insurance Society v. Williamson*⁴⁴ and in *Brimelow v. Casson*.⁴⁵

It was also submitted that the breach procured must be a breach going to the root of the matter and it is said that in this case the breach procured was purely temporary. *De Jetley Marks v. Greenwood*⁴⁶ was cited as authority for that proposition. Careful consideration of that case does not, in my judgment, justify the proposition, and it would seem difficult to justify that principle. In any case, as the defendants' aim was to secure a complete stoppage of supplies to the plaintiffs, the argument that the breach procured was temporary only was difficult to follow.

Finally, it was said that, even if all other defences failed, I ought not to exercise the admittedly discretionary remedy of granting an interlocutory injunction. It was pointed out that the defendants are all trade union officials, and that if an injunction is granted, they will be placed in great personal difficulties in relation to their duties to their respective unions as such, for, of

⁴³ [1905] A.C. 239.⁴⁴ 37 T.L.R. 742, 743.⁴⁵ [1924] 1 Ch. 302.⁴⁶ [1936] 1 All E.R. 863.

course, the unions can continue to press forward their point of view without regard to the injunction, as they are not amenable to law: see section 4 of the Trade Disputes Act, 1906.

Alternatively, it was said that the unions might loyally abide, though not bound, by the injunction, and might wash their hands of the whole matter, and this attitude, it was said, might lead to unofficial strikes, which would be very undesirable. It was said that, if any injunction were granted, no one would know where they were and trade union officials, fathers of chapels and the men themselves would not know their position.

It was further said that it would not be known whether the defendants could call the men out on strike, or alternatively, advise them to strike, nor whether contributions received in response to Briginshaw's circular could be paid to the employees of the plaintiffs who had been dismissed. It was even suggested that the normal conciliation machinery would not work; and it was further suggested that, as the defendants admittedly would suffer no damage by continuance of the injunction, the cross-undertaking was thereby made valueless, and the court must be particularly careful before granting an injunction in those circumstances.

I reject all these arguments. If I had come to the conclusion that a prima facie case had been made out that the defendants or any of them were threatening and intending to commit the tort of procuring a breach of contract for the supplies to the plaintiffs, the justice of the case would most certainly have required that an interlocutory injunction should go against those so threatening and intending, for otherwise, as I have already pointed out, the plaintiffs would suffer irreparable harm before judgment. The defendants could not have complained if they had found themselves in difficulty as a result of their illegal acts, though in fact, in my judgment, the alleged difficulties are forensic rather than real.

However, for the reasons which I have given, the motion must be refused. As I do so solely upon the point that the facts disclosed in the affidavit evidence do not, in my judgment, give rise to the necessary intention to procure a breach of contract, and as that involves an important question of law as to what is sufficient to constitute procurement, the matter is one proper for review, should the plaintiffs desire to take the matter further, and I grant leave to appeal, if it be necessary.

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The plaintiffs appealed.

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Gilbert Beyfus Q.C., M. D. Van Oss and P. Bennett for the plaintiffs (the appellants). This action is brought against the defendants for persuading workmen of firms supplying the plaintiff company not to perform their duty in order to bring pressure on the plaintiffs to employ trade union workmen. The result is to bring about breaches of contract and for this the plaintiffs are liable. There is also a claim for damages for conspiring but this only goes to proof. We do not allege that the defendants were engaged in a conspiracy to injure the plaintiffs but we do say they were engaged in a conspiracy to procure breaches of contract. The court is not concerned with the merits of the trade union known as Natsopa. The object of this application is to protect the plaintiffs from their acts. The sole question is whether their acts were unlawful. The defendants contend that they are protected because this is a trade dispute: see *White v. Riley*.⁴⁷ It is submitted that that contention is wrong. The tort alleged here is interference with the contracts of firms supplying goods to the plaintiffs or taking their goods and it is not a case within section 3 of the Trade Disputes Act, 1906. The test is what was the dominant intention of the defendants in doing the acts they did. What constitutes the tort in question is discussed in *British Motor Trade Association v. Salvadori*,⁴⁸ and see also *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.*⁴⁹ Fraud was one of the grounds of the decision in *National Phonograph Co. Ltd. v. Edison-Bell Consolidated Phonograph Co. Ltd.*,⁵⁰ but there may well be the tort of procuring a breach of contract in such a case as this without fraud: *British Industrial Plastics Ltd. v. Ferguson*.⁵¹ These authorities establish the law applicable in the present case. In *Camden Nominees Ltd. v. Forcey*⁵² the advice given was to withhold rent. [They referred also to *Smithies v. National Association of Operative Plasterers*.⁵³] The whole law was originally laid down in *Lumley v. Gye*,⁵⁴ and it shows that when someone does an act with the intention of bringing about a breach of contract he is liable: see also *Blake v. Lanyon*.⁵⁵

[EVERSHED M.R. You say that obtaining a breach of contract is different from procuring a strike?]

Yes. Compare *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.*⁵⁶ With the possible exception of *Crofter Hand Woven Harris Tweed*

⁴⁷ [1921] 1 Ch. 1.⁴⁸ [1949] Ch. 556.⁴⁹ [1905] A.C. 239; [1903] 2 K.B. 545.⁵⁰ [1908] 1 Ch. 335.⁵¹ [1940] 1 All E.R. 479.⁵² [1940] Ch. 352.⁵³ [1909] 1 K.B. 310.⁵⁴ 2 El. & Bl. 216.⁵⁵ 6 T.R. 221.⁵⁶ (1926) 42 T.L.R. 376.

Co. Ltd. v. Veitch,⁵⁷ there is no example of a case where pressure was put on a company by cutting off supplies. In order that a case shall be brought within the Trade Disputes Act, 1906, s. 3, some act must be done by a person in furtherance or in contemplation of a trade dispute. The acts done here were of a very different character: see *Sorrell v. Smith*.⁵⁸ The complaint here is not that the defendants have interfered with the plaintiffs' trade or business but that they have done so by causing other bodies to break their contracts: see, as to this distinction, *Royal London Mutual Insurance Society Ltd. v. Williamson*⁵⁹ and *Brimelow v. Casson*.⁶⁰

The court has not to be satisfied before granting an interlocutory injunction that the plaintiffs are right, the plaintiffs need only show a *prima facie* case. If they have done that, which it is submitted they have done, then the court has to balance the possibility of injustice to the plaintiffs if an injunction is refused, against the possible injustice to the defendants if it is granted. Here the plaintiffs will suffer great financial loss if an injunction is not granted. The defendants will suffer no loss. The balance of convenience is in granting an injunction.

Gerald Gardiner Q.C. and *M. R. Nicholas* for the first, second and third defendants, Deakin, Wood and Intin, who were officers of the Transport and General Workers' Union, the union to which Bowaters' drivers belonged. The plaintiffs do not dispute that there is here a trade dispute nor do they contend that the defendants conspired to injure the plaintiffs. This is an action in tort against six defendants, and since conspiracy to injure is not alleged, the plaintiffs' case against each must be considered separately. These three defendants, officers of the Transport and General Workers' Union, had no authority to order a strike of Bowaters' drivers, nor did they in fact do so. All the officials of this union did was to point out to officials of Bowaters the difficulties which would arise should Bowaters order their drivers to drive paper to the plaintiffs, whose premises were picketed, and to advise Bowaters not to order their drivers to deliver paper to the plaintiffs. In fact, Bowaters never required their drivers to deliver paper to the plaintiffs. The merits of the dispute are not relevant.

Unless a conspiracy to injure is established, the later authorities show that the decision in *Quinn v. Leathem*⁶¹ has no application.

⁵⁷ [1942] A.C. 435.

⁵⁸ [1925] A.C. 700.

⁵⁹ 37 T.L.R. 742.

⁶⁰ [1924] 1 Ch. 302.

⁶¹ [1901] A.C. 495.

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It is conceded that apart from the Trade Disputes Act, 1906, to procure a breach of contract would be unlawful.

The defendants' first contention is that in what they did they are protected by section 3 of the Trade Disputes Act, 1906. If the plaintiffs are right in contending that a tort is committed should the exercise of the right to strike result in breaches of any contract made by an employer with his customers the right to strike would become non-existent. The authorities do not bear out the plaintiffs' contention. [They referred to *Gaskell v. Lancashire and Cheshire Miners' Federation*,⁶² *Hodges v. Webb*⁶³ and *White v. Riley*.⁶⁴] The only case in which the plaintiffs' point was considered is *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*.⁶⁵

Secondly, it is contended that the tort of procuring breaches of contract is limited to the case where there is direct personal persuasion of one of the parties to a contract to break it. In *Lumley v. Gye*,⁶⁶ it was laid down that it was a tort to procure a breach of a contract for services. The tort was extended to procuring breaches of other contracts: *Bowen v. Hall*,⁶⁷ *Temperton v. Russell*.⁶⁸ In every case but *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.*⁶⁹ there had been personal persuasion to induce a breach of contract. In that case an independent tort had been committed.

Thirdly, if the plaintiffs' argument were well founded, the defendants would be liable for inducing Bowaters to break their contract with a third person. A servant cannot be guilty of a tort of inducing his own master to break his contract. A master is liable for the torts of his servants. The cause of an action in this case would be against Bowaters. [They referred to *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.*,⁷⁰ *National Phonograph Co. Ltd. v. Edison-Bell Consolidated Phonograph Co. Ltd.*⁷¹ and *British Motor Trade Association v. Salvadori*.⁷²] The mere fact that something is done to cause a breach of contract is not sufficient to create a liability: *Stott v. Gamble*.⁷³ The inducer of such a breach is only liable if he uses illegal means.

[EVERSHED M.R. Supposing in fact the three defendants persuaded and induced employees of Bowaters to break their

⁶² (1912) 28 T.L.R. 518.

⁶³ [1920] 2 Ch. 70.

⁶⁴ [1921] 1 Ch. 1.

⁶⁵ [1942] A.C. 435.

⁶⁶ 2 El. & Bl. 216.

⁶⁷ (1881) 6 Q.B.D. 333.

⁶⁸ [1893] 1 Q.B. 435.

⁶⁹ 42 T.L.R. 376.

⁷⁰ [1905] A.C. 239; [1903] 2 K.B. 545.

⁷¹ [1908] 1 Ch. 335.

⁷² [1949] Ch. 556.

⁷³ [1916] 2 K.B. 504.

contract, that apart from the Trade Disputes Act, 1906, would be actionable.]

It is submitted not, though in any case that Act would afford an answer. The action is too remote. These three defendants would certainly not have erred if in fact the plaintiffs' works were picketed. The aim of every trade union official is to localize any dispute: see *Sorrell v. Smith*.⁷⁴ There is no evidence here of direction given to employees of Bowaters to deliver to the plaintiffs, followed by a refusal to do so. The three defendants are under no liability: *G. Scammell & Nephew Ltd. v. Hurley*⁷⁵ and *De Jetley Marks v. Lord Greenwood*.⁷⁶ Further, if these three defendants induced a breach, they were justified in doing so: *Glamorgan Coal Co. Ltd. v. South Wales Miners' Federation*.⁷⁷ Again, if the defendants knowingly induced a breach of contract they were protected by the Trade Disputes Act, 1906, s. 4. [They referred to *Royal London Mutual Insurance Society Ltd. v. Williamson*⁷⁸ and *Brimelow v. Casson*,⁷⁹ cases previously referred to.]

[JENKINS L.J. Is not section 4 directed to protecting a trade union from an action for tort? That was the view in *Bussy v. Amalgamated Society of Railway Servants*.⁸⁰]

The plaintiffs' statement that these defendants have been acting so as to cause a breach of contract is completely untrue. [They referred also to *British Industrial Plastics Ltd. v. Ferguson*⁸¹ and *Long v. Smithson*.⁸²]

Lindner for the fourth and fifth defendants, Briginshaw and Moncrieff, officers of Natsopa, adopted the argument of Mr. Gardiner. The issues of law are: (1) was there a breach of contract? and (2) was such proceeding unlawful or protected by section 3 of the Act of 1906? The plaintiffs' case was that all the acts complained of were acts done knowingly to cause a breach of contract so as to be wrongful. It must be emphasized that the acts must be done knowingly of specific intention. These defendants deny that this was so.

It must, however, be conceded that an employee can lawfully determine his employment and can lawfully give notice of his intention to do so if called upon to do particular work: *Hodges v. Webb*⁸³ and *White v. Riley*.⁸⁴ An injunction should not be

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⁷⁴ [1925] A.C. 700.⁷⁵ [1929] 1 K.B. 419.⁷⁶ [1936] 1 All E.R. 863.⁷⁷ [1903] 2 K.B. 545.⁷⁸ 37 T.L.R. 742.⁷⁹ [1924] 1 Ch. 302.⁸⁰ (1908) 24 T.L.R. 437.⁸¹ [1940] 1 All E.R. 479.⁸² (1918) 118 L.T. 678.⁸³ [1920] 2 Ch. 70.⁸⁴ [1921] 1 Ch. 1.

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granted in this case for it is impossible so to frame an injunction that it would be confined to acts which are illegal. Further these defendants are merely acting as agents and are carrying out the terms of their employment.

Sir Frank Soskice Q.C., John Thompson and Colin Fawcett for the last defendant, Morrison, the secretary of the National Union of Printers, Bookbinders and Paperworkers. We base our case on the words of Lord Simon L.C. in the *Crofter's case*.⁸⁵ For the tort of procuring a breach of contract to arise, the offender must persuade or induce a party to the contract to break it or he must employ unlawful means to procure the breach of contract. There is no other or wider tort. The fact that a man does what he is entitled to do, knowing or even intending that his act will result in some person breaking his contract, is not a tort. If no unlawful means are employed, the tort only arises where there is direct persuasion or inducement to break a contract. There is no evidence that this defendant took any step to procure any breach of contract. [They referred to *Allen v. Flood*,⁸⁶ *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.*,⁸⁷ *National Phonograph Co. Ltd. v. Edison-Bell Consolidated Phonograph Co.*,⁸⁸ *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.*⁸⁹ and *British Motor Trade Association v. Salvadori*.⁹⁰] Further it is submitted that the defendant is protected by the second limb of section 3 of the Trade Disputes Act, 1906.

Beyfus Q.C. in reply. It is submitted that it is a tort for persons to conspire together to procure breaches of contract and this whether any party to the contract is directly persuaded to break it and whether any illegal means are employed or not. The evidence here shows that the defendants did conspire to procure the breach of Bowaters' contract with the plaintiffs and accordingly the acts of each conspirator became the acts of all the others.

It is submitted that section 3 of the Trade Disputes Act, 1906, does not protect the defendants. The section must be construed in the light of the circumstances in 1906. The second limb of the section does not apply to contracts with third persons.

The plaintiffs do not ask for a mandatory injunction requiring Bowaters' drivers to deliver paper to the plaintiffs. All they ask is an injunction restraining the defendants from preventing paper reaching the plaintiffs.

⁸⁵ [1942] A.C. 435, 442.⁸⁶ [1898] A.C. 1.⁸⁷ 42 T.L.R. 376.⁸⁸ [1908] 1 Ch. 335.⁸⁹ [1905] A.C. 239; [1903] 2 K.B. 545.⁹⁰ [1949] Ch. 556.

EVERSHED M.R. The appeal in this case from Upjohn J.'s order has involved a consideration of many important, novel and difficult questions. In the ordinary way, therefore, I should have wished and thought it right to reserve my judgment, but it has been made plain that the case is one of considerable urgency for the parties concerned, who may indeed desire to take this matter further, and it is, moreover, an interlocutory application. In those circumstances, having reached my conclusion on these matters, I have thought it right and in the best interests of the parties that I should at once deliver my judgment.

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The matter comes before us upon an interlocutory application. The courts have long exercised beneficial powers of granting interlocutory relief by way of injunction pending the trial of an action, and in proper cases they have thereby prevented undoubtedly what otherwise might have been grave injury to a plaintiff—injury which could not have been put right or effectively remedied by any order made on the trial.

Indeed the learned judge in the present case has formed the view that the acts of which the plaintiffs complain, if allowed to continue, will cause what he called “irreparable injury” to the plaintiffs in their business. That is not to say that on that ground alone the court will grant injunctions; nor has Mr. Beyfus so argued. He must indeed, as he concedes, at least show that he has a *prima facie* case or, if you will, a strong *prima facie* case that the plaintiffs are entitled to the remedy they seek. If they go so far, then I have no doubt that the courts will, where necessary, grant an injunction in mandatory form.

The question then is: have the plaintiffs established on the facts proved in the case a *prima facie* right (at least) to the injunctions which they seek? In ordinary cases it may not be a difficult matter for the courts to determine whether injunctions of this character should be granted, for the court then will not investigate at length and fully all the matters of law which may be involved. If it appears that the plaintiffs have a real and serious case to argue and that they have a *prima facie* right to some relief, then the court will not investigate the matter further upon the motion. In the present instance, we have heard long arguments upon these difficult questions, and I would like to express my appreciation to counsel for the assistance which the court has received. In those circumstances, I must now state what I conceive the law to be, and then decide the matter now before us on that basis.

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The result may perhaps be in some degree unsatisfactory, because of necessity the facts have not been yet fully investigated. In the course of his forceful reply, Mr. Beyfus supposed that questions were put to a jury: did this, that or the other defendant do this, that or the other thing, or intend such and such a result? It is impossible at this stage to treat the matters of fact in that way.

The questions of fact are raised upon affidavit evidence. To the affidavits made on the plaintiffs' behalf, sworn testimony by affidavit has been put in by the defendants, to which, in the nature of things, perhaps, it has not been practicable to reply; and it is the fact that the plaintiffs have made no reply. In those circumstances, the court cannot, as the judge pointed out, disregard the sworn assertions of the defendants, unless they are shown from other material in the case clearly to be wrong. On the other hand, the court will not, I conceive, decline to draw from the whole material before it the natural and reasonable inferences which should be drawn.

[His Lordship summarized the evidence generally and continued:] Mr. Beyfus' case for the plaintiffs is that this breach or non-fulfilment of the contract between Bowaters and the plaintiffs, referred to in the letter of May 6, has been knowingly and deliberately brought about by the acts of the several defendants, and brought about by their persuading and inducing men in the service of Bowaters, belonging to the respective unions concerned, to refuse to load or drive paper required for the plaintiffs.

Mr. Beyfus formulated his case in this way: he says that the acts complained of, namely, the acts of persuading and inducing by the defendants, were acts done knowingly, that is, with the deliberate aim and object of causing breaches of contract for the supply of paper on the part of Bowaters to the plaintiffs, as they in fact did, and therefore, notwithstanding anything in the Trade Disputes Act, 1906, were wrongful.

The plaintiffs' claim is against all the defendants, first, for an injunction "restraining the defendants and each of them from "doing (whether by themselves or by their servants, agents or "workmen or any of them or otherwise howsoever) any act with "a view to causing or procuring a breach or breaches by Bowaters "or any other company, firm or person of any contract between "the plaintiffs and Bowaters or such other company firm or "person for the supply of newsprint or any other goods what-soever to the plaintiffs." A further injunction was asked for,

carrying the ambit of the first a little further. Paragraph 3 of the writ asks for damages "for conspiracy to procure the said breach "or breaches of contract"; paragraph 4 asks for damages "for "procuring a breach or breaches of contract as aforesaid"; and then there are two formal paragraphs.

I need hardly say, as the judge observed, that we are not in this case concerned with the propriety upon ethical or social grounds of anything that any of the parties to the action have done. It is quite plain, I should imagine, that the action which the plaintiffs have taken since 1926 is one that is likely, and must have been known by them to be likely, to cause the utmost anger and resentment amongst trade unionists. On the other hand, it is said by Mr. Beyfus that it is a strong, harsh—nay, even tyrannical—thing if the great forces which the trades unions have at their command can be mobilized to intervene so as to starve or destroy the business of any firm or company which may have taken any step of which the trade union movement disapproves.

These are matters of social conduct, with which we are not concerned. The question with which we are concerned is whether there has been shown to be here such an unlawful act upon the part of the defendants or any of them as entitles the plaintiffs to relief.

I will refer to certain concessions which Mr. Beyfus has made and to which, again, he has without variation adhered throughout the hearing before us. The concessions are stated in the judgment of Upjohn J.: "For the purposes of this motion the plaintiffs "concede two things: first, that there is in existence a trade "dispute for the purposes of section 3 of the Trade Disputes Act, "1906; secondly, that the conspiracy alleged between the "defendants is a conspiracy the predominant object of which is "to secure the interest of the defendants and not to injure the "plaintiffs, and is not, therefore, actionable per se." The judge then refers to *Sorrell v. Smith*.⁹¹

The judge's next sentence is as follows: "For the purposes of "this motion, therefore, the element of conspiracy alleged to "exist may be ignored." Of that sentence Mr. Beyfus complains. With all deference to the judge, I think Mr. Beyfus is entitled to make a complaint. The reference to a conspiracy per se and to *Sorrell v. Smith*,⁹¹ means, as I understand it, that for the purposes of the motion Mr. Beyfus is not relying on a conspiracy directed to injure the plaintiffs, which, if done and

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because it is done in concert, might give rise to a cause of action as formulated in the case mentioned. But that leaves it open to him to allege, as he has alleged, that there remains another conspiracy, namely, a conspiracy to achieve a purpose otherwise unobjectionable by means which at any rate include unlawful means, whether known by the doers to be unlawful or not.

The significance of Mr. Beyfus' adherence to that part of his claim is this: if it is well founded and if he is able to show that all the defendants were parties to the conspiracy, then the actions of any one of them in furtherance of the objects of their conspiracy will be treated as the actions of all of them; so that, to make the matter more precise, Deakin, for example, would be held responsible for what I have ventured to describe—I do not do so in any offensive way—as the cries and exhortations of Briginshaw.

It will be convenient if I say at once that, in my judgment, for the purposes of this motion, Mr. Beyfus has not established the existence of any such conspiracy.

[His Lordship reviewed the evidence on the issue of conspiracy and continued:] In my judgment there is no such material before the court as would entitle it to hold that there was here a conspiracy of the kind alleged for the purposes of this motion between any of the defendants to the action.

It will be convenient now for me to go immediately to the principal matters of law with which we are concerned and to ask, and attempt an answer to, the question whether, apart for the moment from anything in the Trade Disputes Act, 1906, there has been any wrongful act by any defendant according to the common law.

The formulation of the case on which Mr. Beyfus has based himself is founded upon the language of Lord Macnaghten in the well-known case of *Quinn v. Leathem*,⁹² to the effect that any violation of legal rights, including rights under contract, committed knowingly and without justification, is a tortious act.

In raising the matter in the way in which it has been raised in this case the plaintiffs have (so far as the very considerable and, I am quite ready to assume, exhaustive researches of counsel have gone), put forward an argument never formerly put or decided by the courts, at any rate in this form. In one case, *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*,⁹³ the question appears to have been raised when the case was proceeding to the House

⁹² [1901] A.C. 495, 510.

⁹³ [1942] A.C. 435.

of Lords. Mr. Gardiner produced for us the appellants' case in the House of Lords, from which it appears that the present point in all essentials was put as part of their case. Mr. Beyfus also found for us the respondents' case, from which it appears that the answer there suggested was that there was no evidence whatever that the appellants had any knowledge of the existence of any contract or acted knowingly with the intention of breaking any contract which existed. Whether in the light of that answer or for other reasons, the appellants, so far as the report of the case in the House of Lords goes, do not appear to have proceeded with or pressed that point at all.

It will be convenient if I make at this stage some reference to the *Crofter* case.⁹³ It was a case which concerned the manufacture of cloth in the Island of Lewis. The charge made against the officials and members of the Transport and General Workers' Union was to this effect: that in the interests of one body of manufacturers in the island, whose yarn was spun in the island, they instructed and procured their members to refuse to handle yarn made outside the island and imported into the island for other manufacturers at a less price than the island's spinners charged. It is, however, clear that, though an embargo (I use the word used in the case) to that effect was imposed, it involved no breach of contract on the part of the dockers concerned. It is stated in terms in the headnote that the dockers, without any breach of contract, acted in accordance with those instructions.

I have mentioned that the point now raised found its place in the plaintiffs' case, and there is one sentence in Lord Simon L.C.'s speech which seems to reflect its existence⁹⁴: "In the present case, the evidence did not support an allegation that the defendants, or either of them, had procured a breach of contract, and, if one of them, acting alone, had without employing unlawful means induced the dockers to refuse to handle the appellants' goods, I cannot see that any action would have lain against him."

I think, however, that Mr. Beyfus is entitled to say that that sentence is not to be regarded as a concluded and deliberate rejection of the argument which has been the main burden of his case before us.

I have made reference to the formulation of the tort, which Mr. Beyfus alleges, by Lord Macnaghten⁹⁵: "A violation of a

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⁹³ [1942] A.C. 435.⁹⁵ [1901] A.C. 495, 510.⁹⁴ Ibid. 444.

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"legal right committed knowingly is a cause of action, and that
 "it is a violation of legal right to interfere with contractual
 "relations recognized by law if there be no sufficient justification
 "for the interference." On the face of it, that is a broad state-
 ment which might appear to cover a case such as the present, and
 cover it whether or not the employees of Bowaters were induced
 to commit, or did commit, any breach of their contracts of service
 with Bowaters. The question on this part of the case then is:
 what is the extent of this tort, commonly known as the tort of
 procuring breaches of contract? Is Lord Macnaghten's formula-
 tion to be given its prima facie wide effect or must it be treated
 as subject to some, and if so what, limitations?

Now it is not, I think, in doubt that there is a well-established
 principle of our law, established long before *Quinn v. Leathem*,⁹⁵
 that if a man, acting lawfully and in all respects within his rights,
 causes, as a result of what he does, loss to another, that other
 has no remedy, though the loss he suffers is the necessary and
 inevitable consequence of the acts of the first person.

It is also a general proposition of our law, as I understand it,
 that it makes no difference to the matter, as I have stated it, that
 the doer, the first person I have mentioned, in his action was
 actuated by malice or spite against the person who suffered
 damage; or, as a general proposition, that his acts were done with
 the intention of producing that result, that is to say, aimed at the
 person who suffered the loss.

Like all general propositions, if they are stated bereft of any
 context, they require the caution of some reservation or qualifica-
 tion. I do not, for example, forget that there are some actions in
 tort of which malice may be the gist of the case. It occurs, for
 example, in the law relating to defamation and in regard to
 malicious prosecution. But I need not dilate upon that aspect of
 the matter, because it is agreed on all hands that malice, in the
 sense of spite or ill-will directed by any defendant against the
 plaintiffs, plays no part in this case and is an entirely irrelevant
 consideration.

As regards the question of intention, the aim and the purpose
 of the act complained of, the matter is, however, otherwise.

The general proposition which I have stated is undoubtedly
now subject (whatever may be the qualification to be put upon it)
 to the existence of the tort which I have described, and which is
 commonly described, as the tort of procuring breaches of contract;

⁹⁵ [1901] A.C. 495, 510.

and in that tort it is conceded that the actor must have acted with the intention of doing damage to the person damaged and that he must have succeeded in his efforts.

Historically, this tort arose from cases of master and servant, and may have been connected, therefore, rather with matters of status than of contract. But since the majority decision in the well-known case of *Lumley v. Gye*,⁹⁶ subsequently affirmed in *Quinn v. Leathem*⁹⁵ and other decisions, it is plain that this tort of procuring breaches of contract is not confined to contracts between master and servant. *Lumley v. Gye*⁹⁶ was itself a case in which the contract breached was a contract for services rather than of service, under which an operatic singer had engaged herself to sing for the plaintiff.

In the case of *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.*,⁹⁷ afterwards affirmed by the House of Lords, to which I shall hereafter refer as the *Glamorgan* case, a case in this court upon which Mr. Beyfus greatly relies, the contracts broken were contracts of service between the employees of coal mining concerns and the concerns themselves.

In that case, the alleged wrongdoers had directly intervened personally between the contracting parties. They had themselves induced and procured a number of individuals, being parties to the contracts of service, to break their bargains with the other parties to the contracts, their employers.

It was suggested in the course of argument by Sir Frank Soskice and by Mr. Lindner, that the tort must still be properly confined to such direct intervention, that is, to cases where the intervener or persuader uses by personal intervention persuasion on the mind of one of the parties to the contract so as to procure that party to break it.

I am unable to agree that any such limitation is logical, rational or part of our law. In such cases where the intervener (if I may call him such) does so directly act upon the mind of a party to the contract as to cause him to break it, the result is, for practical purposes, as though in substance he, the intervener, is breaking the contract, although he is not a party to it. Such a statement of the matter I take from Pollock's Law of Torts, 15th ed., p. 251, where reference is made to Street's Foundations of Legal Liability. At any rate, it is clear that, when there is such a direct intervention by the intervener, the intervention itself is thereby considered wrongful.

⁹⁵ [1901] A.C. 495, 510.

⁹⁶ 2 El. & Bl. 216.

⁹⁷ [1905] A.C. 239; [1903] 2 K.B. 545.

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I cannot think that the result is any different if the intervener, instead of so acting upon the mind of the contracting party himself, by some other act, tortious in itself, prevents the contracting party from performing the bargain. A simple case is where the intervener, for example, physically detains the contracting party so that the contracting party is rendered unable by the detention to perform the contract. The cases, as I shall presently show, contain several instances where the intervener has employed such means, being means wrongful in themselves.

An example is to be found in a recent case which came before Roxburgh J., *British Motor Trade Association v. Salvadori*,⁹⁸ where there was a criminal conspiracy and the party procuring the breach acted in pursuance of such a conspiracy.

3) *very*: { The matter then proceeds to the next stage. So far I have considered only the case in which the intervener directly acts himself, either by persuasion or by some wrongful act of his own. What is the situation if he attains the same result, indirectly, by bringing his persuasion or procurement to bear upon some third party, commonly a servant of the contracting party, but possibly an independent third person? In my judgment, it is reasonably plain (and the result, as it seems to me, would otherwise be highly illogical and irrational) that, if the act which the third party is persuaded to do is itself an unlawful act or a wrongful act (including in that phrase a breach of contract) and the other elements are present (namely, knowledge and intention to do the damage which is in fact suffered), then the result is the same and the intervener or procurer will be liable for the loss or damage which the injured party sustains.

The cases which have been referred to include some instances of that nature. A strong case was that of *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.*,⁹⁹ where the act performed in itself constituted a trespass quoad the goods of one plaintiff, though not of the goods of the second plaintiff.

A recent instance of the application of the same principle is to be found in the last case, which was cited in reply by Mr. Beyfus, a case in the Privy Council, *Jasperson v. Dominion Tobacco Co.*,¹ where the substance of the matter was that the appellant, Jasperson, induced an agent of the name of Deacon, who had to the appellant's knowledge only a limited authority to buy tobacco for the defendants, to act in breach of his agency

⁹⁸ [1949] Ch. 556.¹ [1923] A.C. 709.⁹⁹ 42 T.L.R. 376.

agreement with the respondents and to engage himself to buy tobacco far in excess of the limit which had been imposed upon him.

Another instance—I do not pretend to cover the whole ground—is *National Phonograph Co. Ltd. v. Edison-Bell Consolidated Phonograph Co. Ltd.*,² where fraud was practised by certain persons upon the factors, so as to cause those factors to break their agreements with their principals.

In all these cases which I have mentioned, there was a wrongful act committed—I use that term to cover breach of contract—by the party directly induced, either a servant or an agent, as the case may be, and commonly, but not I think necessarily, an independent wrongful act by the party inducing, that is, an act itself wrongful apart from the tort for which he was sued.

I have come to the conclusion that the result is otherwise, where the persons induced, being third parties, servants or otherwise, are induced to do acts which are in themselves lawful and involve no breach of contracts on their part with the contracting party. I think that if the matter is examined, any other view involves so serious an inroad upon the principles of the law that I cannot persuade myself that, from so casual a beginning as would otherwise be the case, that has now to be taken as established as the law.

In the course of Mr. Beyfus' reply, I put to him an instance to which I venture to return. It may be useful, since, at any rate, it is quite free from any complication such as may arise from industrial relationships.

My instance was of a contract between A and B, whereby A had contracted to sell his house to B at a price beneficial to A. I will assume that it had been disclosed by A to B that there was in fact a public right of way passing close to the property, but that B had been informed, correctly, that the use of such right of way had become so slender that it was of little, if any, practical significance. Then let it be supposed that some third party, desiring to cause B to resile from the contract with A and to deprive A of the benefit of the contract, persuaded a number of individuals in the neighbourhood to resume the use of the right of way, so that there then passed near the premises a considerable stream of persons, all legitimately using the right of way as such,

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² [1908] 1 Ch. 335.

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as a result of which B decided that the amenities of the premises were so damaged that he was no longer willing to continue.

I find it for myself exceedingly difficult to suppose that, the exercise of the right of way by the persons persuaded being lawful, the intervener would be liable according to the principles of the law for having persuaded them to do that lawful thing. The persons using it might, or might not, themselves have been innocent of any desire to cause damage to A; they might be innocent of any knowledge of the existence of a contract between A and B. If they were so innocent, they themselves would, in my view, clearly not be under any liability. If they knew of the existence of a contract and intended to cause its breach, another question might arise (and this is a matter to which I shall have later to return) whether they would in any circumstances be themselves liable.

Another instance may be quoted which was taken by my brother Jenkins earlier in the case. Let it be supposed that A had made a contract to supply certain goods to B and that the intervener, knowing of the contract and intending to deprive B of its benefit, had proceeded to go into the market and buy up all the goods that he could find of that character, so as to render it impossible for A in fact to perform the contract. Again, I think it is impossible to say, according to the principles of our law, that the intervener in such a case was acting tortiously.

I have referred to cases where the intervener procured or persuaded a servant. The difficulty of carrying the matter so far may be to some extent illustrated by considering what would be the position of the servant, if he were persuaded to do something within the terms of his contract but (to his knowledge) directed to procuring a breach of his master's contract. For in such case a claim might be said to arise not only against the intervener but also against the servant. As was pointed out by Mr. Gardiner, so long as the servant acted within the scope of his authority, the master would be responsible for the act of the servant; in other words, the servant's acts would be the master's acts, and the curious situation would then result that the master would be inducing a breach of his own contract. Quite plainly, he could not be sued both for breach of contract and also for inducing his own breach—in the latter event the damages being at large. So much, I think, emerged from the case of *Said v. Butt*,³ which

³ [1920] 3 K.B. 497.

was approved by this court in the case of *G. Scammell & Nephew Ltd. v. Hurley*.⁴

I adopt for this purpose the statement that I find in Winfield's Law of Torts, 5th ed., 603. Dealing with this tort of interfering with contracts, the author says: "If my servant acting bona fide within the scope of his authority, procures or causes me to break a contract that I have made with you, you cannot sue the servant for interference with the contract; for he is my alter ego, and I cannot be sued for inducing myself to break a contract." Such is the inference from *Said v. Butt*,⁵ which he then discusses. Later he says: "If the servant does not act bona fide, presumably he is liable on the ground that he has ceased to be his employer's alter ego," and so on.

The difficulty (and I think it is a real difficulty) is avoided if the act which the servant is procured to do is not an act in accordance with or under his contract, but is in breach or violation of it.

I come then to such formulation of the result as seems to me to be correct; but I should first add this. The argument that this tort should be confined to such direct intervention or interference as is illustrated, for example, in *Lumley v. Gye*⁶ introduces this strange difficulty. A limited liability company, a *persona ficta*, can only act through agents or servants. If the intervention has to be of so direct a kind, it would obviously create strange problems in the case of a limited liability company. No doubt, if I approach some person in the company who has authority on the company's behalf to make contracts, I may be said to be approaching the company direct. I think that the illustration of the company emphasizes the anomaly which would result if, in the case of a limited company, a tortious act were only committed if the person approached or induced had a particular office or responsibility (actual or perhaps ostensible) in the company.

Dealing first with individual contractors, it seems to me that the intervener, assuming in all cases that he knows of the contract and acts with the aim and object of procuring its breach to the damage of B, one of the contracting parties, will be liable not only (1) if he directly intervenes by persuading A to break it, but also (2) if he intervenes by the commission of some act wrongful in itself so as to prevent A from in fact performing his contract;

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⁴ [1929] 1 K.B. 419.

⁶ 2 El. & Bl. 216.

⁵ [1920] 3 K.B. 497.

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and also (3) if he persuades a third party, for example, a servant of A, to do an act in itself wrongful or not legitimate (as committing a breach of a contract of service with A) so as to render, as was intended, impossible A's performance of his contract with B.

In the case of a company, the approach to or the persuasion of a managing director, or of some person having like authority, may be regarded as being in all respects equivalent to the direct approach of the individual contractor, as found in *Lumley v. Gye*⁶ and in the *Glamorgan* case⁷; but, if the approach is made to other servants of the company, the case, in my view, becomes parallel to an approach made not to the contracting party himself, but to some servant of the contracting party, so that the intervener will only be liable if the act which he procures the servant to do is either a breach of contract towards the servant's master or is otherwise tortious in itself.

I have stated the matter broadly and (using the language of Lord Dunedin) as though the slate were clean, or at any rate very nearly clean; but I must now make some reference to the numerous cases to which we have been very properly referred during the long and interesting argument.

For a short statement of the principles involved I would respectfully like to adopt what is said by Lord Simon L.C. in the *Crofter* case⁸: "First, then, apart from the effects of combination, it is clear that: (1) if A is damaged by the action of B, A nevertheless has no remedy against B, if B's act is lawful in itself and is carried out without employing unlawful means. In such a case A has to endure *damnum absque injuria*. (2) It makes no difference to the above proposition that B in so acting has the purpose of damaging A. A bad motive does not per se turn an individual's otherwise lawful act into an unlawful one. (3) If C has an existing contract with A and B is aware of it, and if B persuades or induces C to break the contract with A, resulting damage to A, this is, generally speaking, a tortious act for which B will be liable to A for the injury he has done him." The phrase "generally speaking" alludes to what follows, namely, the possibility of justification.

That is a short statement in very general terms. As Mr. Beyfus points out, without further explanation and exposition, it may be fairly said not to be completely exhaustive. But it is, I

⁶ 2 El. & Bl. 216.⁸ [1942] A.C. 435, 442.⁷ [1905] A.C. 239; [1903] 2 K.B.

venture to think, a correct statement of our law and Lord Simon L.C.'s first two propositions cover the general law as it stands and stood before the impact of the tort of procuring a breach of contract, a tort originating in its present form in *Lumley v. Gye*.⁹

It would be impossible in a case of this sort to pass the matter over without some reference to the case of *Allen v. Flood*.¹⁰ It is, indeed, useful to refer to what Lord Macnaghten said in that case¹¹: "I do not think there is any foundation in "good sense or in authority for the proposition that a person who "suffers loss by reason of another doing or not doing some act "which that other is entitled to do or to abstain from doing at his "own will and pleasure, whatever his real motive may be, has a "remedy against a third person who, by persuasion or some other "means not in itself unlawful, has brought about the act of "omission from which the loss comes, even though it could be "proved that such person was actuated by malice towards the "plaintiff, and that his conduct if it could be inquired into was "without justification or excuse. The case may be different "where the act itself to which the loss is traceable involves some "breach of contract or some breach of duty, and amounts to an "interference with legal rights. There the immediate agent is "liable, and it may well be that the person in the background who "pulls the strings is liable too, though it is not necessary in the "present case to express any opinion on that point."

Mr. Beyfus said that in the last words that I have read Lord Macnaghten was perhaps prophetic of his later utterance in *Quinn v. Leathem*.¹² For the present I only pause to observe that, where, as is contemplated, some servant by a tortious or other wrongful act procures his master to break his contract, Lord Macnaghten is indicating that, given the knowledge and intention, that servant may be liable, and further suggesting that the person behind the scenes, the person who pulls the strings, the intervener, may be liable also. But the passage I have read seems to me to be consistent with, and only consistent with, such a general formulation of the law as I have attempted already to state.

In the case of *Ware & de Freville Ltd. v. Motor Trade Association*,¹³ Atkin L.J. dealt at some length with the incidence and the significance of intention, motive and so on. That passage, to

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⁹ 2 El. & Bl. 216.¹² [1901] A.C. 495.¹⁰ [1898] A.C. 1.¹³ [1921] 3 K.B. 40, 84.¹¹ Ibid. 151.

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There is a short passage in *Sorrell v. Smith*¹⁴ which may be usefully noted. Lord Dunedin, after having expressed entire approval of Atkin L.J.'s judgment in *Ware & de Freville's case*,¹⁵ says¹⁶: "My Lords, it may seem self-confident to be positive " when so many learned persons have expressed other views, but " candidly I never held a clearer opinion than the one I now " express, that the effect of *Allen v. Flood*¹⁷ and *Quinn v. Leathem*¹⁸ is to settle beyond dispute that in an action against " an individual for injury he has caused to the plaintiff by his " action, the whole question is whether the act complained of was " legal, and motive or intent is immaterial; but that in an action " against a set of persons in combination, a conspiracy to injure, " followed by actual injury, will give a good cause for action, and " motive or intent when the act itself is not illegal is of the essence " of the conspiracy."

That statement is much compressed, but I venture to think that it pays due respect to the well established principles of law, against the background of which the statements in *Quinn v. Leathem*¹⁸ must be viewed. I come now to consider those statements. I read first a short passage from Lord Macnaghten's speech. After referring to *Lumley v. Gye*,¹⁹ he says²⁰: "Speaking for myself, I have no hesitation in saying that I think " the decision was right, not on the ground of malicious intention " —that was not, I think, the gist of the action—but on the " ground that a violation of legal right committed knowingly is a " cause of action, and that it is a violation of legal right to " interfere with contractual relations recognized by law if there be " no sufficient justification for the interference."

A similar commendation of the decision in *Lumley v. Gye*²¹ is to be found in Lord Lindley's speech²²: "If the above " reasoning is correct, *Lumley v. Gye*²³ was rightly decided, as " I am of opinion it clearly was. Further, the principle involved " in it cannot be confined to inducements to break contracts of " service, nor indeed to inducements to break any contracts. The " principle which underlies the decision reaches all wrongful acts

¹⁴ [1925] A.C. 700.

¹⁵ [1921] 3 K.B. 40.

¹⁶ [1925] A.C. 700, 723, 724.

¹⁷ [1898] A.C. 1.

¹⁸ [1901] A.C. 495.

¹⁹ 2 El. & Bl. 216.

²⁰ [1901] A.C. 495, 510.

²¹ 2 El. & Bl. 216.

²² [1901] A.C. 495, 535.

²³ 2 El. & Bl. 216.

“done intentionally to damage a particular individual and
“actually damaging him.”

Those, as I have said, are wide statements. But I think, for reasons which I have attempted to give, that it would be wrong and contrary to the intention of Lord Macnaghten and Lord Lindley to expand them to an extent greater than I have defined. I think that neither of those very learned Lords could have intended so startling an inroad into what other noble Lords in other cases treat as axiomatic in our law; nor do I think that any of the succeeding cases did more than apply the law so formulated, but also limited as I have already indicated, in the cases which they had to decide. Certainly no case has been found which extended the principle which I have stated beyond the limits which I have attempted to give it. Lord Macnaghten used, after all, the strong word “violation,” a word, I should have thought, necessarily carrying with it the idea of something more than mere influence by acts otherwise in themselves lawful. And Lord Lindley speaks, not of acts, but of wrongful acts done intentionally to damage a particular individual and actually damaging him.

If that be the law, I must now come to the facts and see what the conclusion must be. I have already indicated that there is, in my opinion, no sufficient case made out for a conspiracy. I must, therefore, deal with each of the defendants in turn.

[His Lordship considered the evidence against each defendant in turn and held that in each case the evidence did not establish such action as would constitute the tort of wrongfully procuring the breach of the contract in question. His Lordship continued:] As to the whole of the defendants, it follows accordingly that, in my judgment, there is not on this motion proved any procuring of any wrongful act by any member of any of the unions concerned.

I need only add that there was, on the evidence, no breach of contract by any workmen, since Bowaters, for reasons which I doubt not were prudent, took the line that they would not order any man either to load or to drive paper for the plaintiffs. They accepted the situation as they found it and made no attempt to contrive to get the paper to the plaintiffs by any other means. It is true, if my analysis is correct, that there was, in the case of the first three defendants, what might be called a direct approach to Bowaters, but, so far as I understand the evidence, I cannot see that that direct approach amounted to anything more than a statement of the facts, as the members of the union understood them to be. In particular there was a reference to picketing,

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which was obviously of great significance; and, whether that reference was correct or incorrect, there is no suggestion that it was not made in the bona fide belief of its truth.

I appreciate that in these matters there is a difficult question of distinguishing between what might be called persuasion and what might be called advice, meaning by the latter a mere statement of, or drawing of the attention of the party addressed to, the state of facts as they were. In the case of *Camden Nominees Ltd. v. Forcey*,²⁴ before Simonds J., it was held that the advice given was of such a nature (was of a character obviously intended to be acted upon) that it was for all practical purposes equivalent to persuasion; but, if the matter be advice merely (in the ordinary sense of that word), it seems to me that there can be no complaint about it; nor do I think that Mr. Beyfus can derive any substantial assistance by saying that Bowaters proved themselves merely chicken-hearted and that the ease with which a person may be persuaded is not a relevant consideration in determining whether the persuader was wrongful in what he was doing. That may, as a general proposition, be true; but in this case the evidence on this motion, whatever may emerge when the matter is fully investigated, falls too far short of any proof of what is required to constitute a cause of action such as would entitle the plaintiffs to an injunction. Put another way, I cannot see that the evidence establishes that there was anything done by Bowaters vis-à-vis the plaintiffs which is fairly attributable to any such pressure, persuasion or procuration on the part of any of these defendants, as would in any event cause them to be liable in tort.

The whole matter is, indeed, when it is examined at large, of a very vague character. The links in the chain which connect the defendants with the plaintiffs are, at points at any rate, as I think, very unsubstantial. I have referred already to the absence of proof of direct procurement or attempted procurement of wrongful acts on the part of the workmen. There were, in fact, so far as I can see, no wrongful acts at all on the workmen's part. There is, moreover, no evidence that there was actual knowledge, on the part of any of the persons charged, of the contract or of any contract between Bowaters and the plaintiffs, assuming such contract to have been broken; or at least, if these persons thought that there might be or was some contract, any knowledge of the terms of that contract.

²⁴ [1940] Ch. 352.

If all else were satisfactorily proved, it might well be (having regard to common knowledge about the way business is conducted) that absence of such strict proof would not suffice to prevent the grant of relief; but, when the whole matter is generally regarded, it seems to me that the case is a very different case from anything that was contemplated by Lord Macnaghten in *Quinn v. Leathem*²⁵ and approved in subsequent cases in which *Quinn v. Leathem*²⁵ has been applied.

I find it, therefore, not unnatural that the judge thought that the chain of causation, at some point at any rate, had been broken. I only venture to differ from him in so far as he rested his conclusion on the proposition that it was insufficient for the purposes of the plaintiffs' claim to show that the alleged breach of contract by Bowaters was indirectly procured through breaches of contract by the workmen; since, as I think, if it were shown that the workmen were induced or procured to break their contract vis-à-vis Bowaters, *prima facie*, if the intent and knowledge were shown, that would suffice for present purposes.

Having reached that conclusion, it is unnecessary for me to express concluded opinions on the matters raised in regard to the Trade Disputes Act, 1906, particularly on the point of great difficulty which emerges in reference to section 3 of that Act. The section is well known. It provides: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Having read the section, it is pertinent to observe that it would not, as I follow it, having regard to Mr. Beyfus' concession, be a wrongful or actionable act on the part of these defendants vis-à-vis Bowaters to cause workmen belonging to their respective unions to break their contracts of employment; but, if that be so, it does not follow, nor is it in my judgment the case, that, if the workmen did break their contracts, they, the workmen, did not do an unlawful act, in the sense of committing a breach of contract. I should, therefore, be prepared to hold that the defendants would not be entitled to resist the plaintiffs' claim merely by saying that their own procurement of the workmen's breach of contract was vis-à-vis Bowaters protected by section 3.

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But I would like to make clear that I am not to be taken, in formulating the case as I have, to be deciding that, if the workmen broke their contracts with Bowaters, they would themselves be liable to the plaintiffs for the damage which the plaintiffs suffered. Of course, as a premise to any such claim, knowledge and intent of the workmen would have to be proved; but, even so, since the workmen could lawfully have given notice, which presumably would be of a very short character, it may well be that the damage could not be said to flow from the fact that they had ceased loading immediately instead of after giving the requisite notice. Further, it seems to me difficult to suggest, as against any one individual workman, that his particular act could have resulted in the damage which the plaintiffs suffered. Whether any case for conspiracy would lie against all of them is, of course, another matter, and we are not in any way concerned with it.

There remains, however, the more substantial point that the defendants were in any case protected by the second limb of section 3, "or that it is an interference with the trade, business, "or employment of some other person." It is clear that that limb, if available, could be used, not only as excusing the acts themselves, but also as a justification for the acts done, if otherwise not excusable. I confess that the words "an interference "with the trade, business, or employment of some other person," being so wide in scope, would appear at first sight to cover such a matter as that with which we are now concerned; but there are, and as Mr. Beyfus has suggested, forcible arguments to the contrary.

It is right, in my judgment, as Mr. Beyfus asked us to do, to construe this section by having due regard to the state of the law at the time the section was enacted. The judgment of Romer L.J. in the case of *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland* ²⁶ is, I think, some indication that at that date the extent to which a person might be liable merely for interfering in some way with the trade or business of other persons was in doubt: see also the speech of Lord Loreburn L.C. in the case of *Conway v. Wade*.²⁷ Moreover, it would be a curious way to enact the matter if so wide a significance was to be given to the second limb, for in that event the words "of "employment" in the first limb seem to be otiose—unless it was intended by the first limb to deal with the specific matter most in

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²⁶ [1903] 2 K.B. 600.²⁷ [1909] A.C. 506, 510.

the minds of the legislature and then to use in the second part of this section general words, which might or might not also cover the subject-matter of the first limb.

Such opinions as have been expressed on the meaning of the second limb would appear to support Mr. Beyfus' argument. Twice the matter came before Russell J., and in the later of those cases, *Brimelow v. Casson*,²⁸ Russell J. expressed the view that the argument for which Mr. Beyfus contends was, to use the judge's language, "a good point"—a view which had also, though no reasons were stated, been taken in the Irish case of *Riordan v. Butler*.²⁹

Finally, in the notes to this section in Halsbury's Laws of England, 2nd ed., Vol. 32, pp. 521, 522, which was written by Slessor L.J., the same view was taken.

In the circumstances, and in particular having regard to the fact that this matter may be argued by the defendants on the question of justification, I think it desirable that I should express no view of my own upon this matter, except to say that, if the plaintiffs proved themselves otherwise entitled, I should myself be inclined to think that section 3 of the Trade Disputes Act, 1906, would not suffice to prevent the granting of an injunction on this motion.

Other points were taken on section 4 and 5 of the Trade Disputes Act, 1906, which I hope that I shall be excused for dealing with somewhat summarily. It was suggested that there was protection to be derived from section 4, since the defendants were in truth officials of the union and section 4 was directed to prohibiting actions of tort against a union. I do not think that that is any answer to the present case, if otherwise good; nor do I find in the definition paragraph of section 5 anything that would assist the defendants towards their construction of section 3.

Then the point was made by Mr. Gardiner that in no circumstances was it shown that there was any sufficient knowledge of the contract or intent that the contract was broken, in the sense that it was entirely repudiated; that the breach went to the root of the contract. Upon those matters, likewise, I express no view—not the less because the other party to the contract, Bowaters, is not before the court. I only indicate, though expressing no concluded opinion, that, notwithstanding the view expressed by Porter J. in *De Jetley Marks v. Lord Greenwood*,³⁰ I am not

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²⁸ [1924] 1 Ch. 302, 314.³⁰ [1936] 1 All E.R. 863.²⁹ [1940] I.R. 347.

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at present satisfied that the breach procured must be of a kind that goes to the root of the contract. I am not clear upon what principle that view was based.

These, however, are all matters which in the circumstances I think I can and should leave without saying more about them. I must also not be taken by any means to assent to the view that, if entire repudiation, a breach going to root of the contract, is required, that such a breach did not in the present circumstances occur.

It is plain, finally, that it is unnecessary for me also to say anything in regard to the form of injunction that might be appropriate, if I had thought that any injunction were appropriate upon this motion. That it might not in all the circumstances be wholly effective, no doubt is something which the court will consider; but I am far from satisfied that that circumstance would, if the plaintiffs were otherwise right, be a sufficient ground for persuading the court to grant no remedy. I should, however, like to make it quite plain that I accept without reservation the assurance given to this court by all the defendants through their counsel that, if any injunction were granted, it would be loyally implemented by each of the defendants to the best of his ability.

I come to the conclusion that this appeal fails and should be dismissed.

JENKINS L.J. This is an appeal from an order of Upjohn J. refusing the plaintiffs interlocutory relief in an action brought by them against certain trade union officials in respect of allegedly wrongful acts done by the defendants in furtherance of what, for the purposes of the motion to which the appeal relates, is admittedly a trade dispute within the meaning of the Trade Disputes Act, 1906.

The occasion of the dispute seems to have been the alleged summary dismissal by the plaintiffs from their employment of one McKay, a member of the National Society of Operative Printers and Assistants (Natsopa); but the substantial bone of contention, if I may so describe it, is the policy pursued by the plaintiffs for many years of excluding trade union members from their employment.

In furtherance of the dispute, Natsopa members in the employ of the plaintiffs (for there appears to have been a considerable number of such, notwithstanding the ban) were called out on strike on April 19 of this year, and the acts complained of in the action are in the nature of allegedly wrongful interference with

contractual relations between the plaintiffs and other companies, designed to deprive, and in fact depriving the plaintiffs, who are printers and publishers, of necessary supplies of paper and ink.

The parties to this unfortunate controversy are entitled to advance their respective sides of it by any lawful means they think fit to adopt, and the sole question for the court is whether the defendants or any and, if so, which of them have, as alleged by the plaintiffs, overstepped the bounds of lawful action in the promotion of their cause or, perhaps I should say, the cause of Natsopa.

Apart from the effect of the Trade Disputes Act, 1906, the principles of law to be applied in this case are thus summarized by Lord Simon L.C. in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*³¹: "First, then, apart from the effects of combination, it is clear that (1) if A is damaged by the action of B, A nevertheless has no remedy against B, if B's act is lawful in itself and is carried out without employing unlawful means. In such a case A has to endure *damnum absque injuria*. (2) It makes no difference to the above proposition that B in so acting had the purpose of damaging A. A bad motive does not per se turn an individual's otherwise lawful act into an unlawful one. (3) If C has an existing contract with A and B is aware of it, and if B persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract," and the passage goes on to give an example of such justification.

In view of Mr. Beyfus' disclaimer for the purposes of the motion of any allegation of conspiracy to injure, the reference to the effect of combination, developed later in the same speech, requires no further notice here.

Lord Simon L.C.'s first and second propositions found earlier recognition in the speech of Lord Macnaghten in *Allen v. Flood*,³² where he said: "I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or

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³¹ [1942] A.C. 435, 442.

³² [1898] A.C. 1, 151.

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 1952 "proved that such person was actuated by malice towards the
 "plaintiff, and that his conduct if it could be inquired into was
 "without justification or excuse.

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"The case may be indifferent where the act itself to which
 "the loss is traceable involves some breach of contract or some
 "breach of duty, and amounts to an interference with legal
 "rights. There the immediate agent is liable, and it may well
 "be that the person in the background who pulls the strings is
 "liable too, though it is not necessary in the present case to
 "express any opinion on that point."

See also the judgment of Atkin L.J. in *Ware & de Freville Ltd. v. Motor Trade Association*,³³ where he said: "Now in
 "what respect does an intention to injure the plaintiff affect the
 "legal position stated above? It appears to me to be finally
 "decided by the majority in the House of Lords in *Allen v. Flood*³⁴ that an act otherwise lawful is not made unlawful by
 "an intention to injure, except in the case of a combination to
 "injure. That decision is binding upon every tribunal in the
 "land; it certainly binds the Court of Appeal; and though, after
 "it was given, divers judicial personages more or less respectfully
 "kicked against the pricks, speaking humbly for myself I
 "unreservedly accept the reasoning of the majority judgments."

To the same effect is this passage from the speech of Lord
 Dunedin in *Sorrell v. Smith*³⁵: "My Lords, it may seem self
 "confident to be positive when so many learned persons have
 "expressed other views, but candidly I never held a clearer
 "opinion than the one I now express, that the effect of *Allen v. Flood*³⁶ and *Quinn v. Leathem*³⁷ is to settle beyond dispute that
 "in an action against an individual for injury he has caused to
 "the plaintiff by his action, the whole question is whether the act
 "complained of was legal, and motive or intent is immaterial;
 "but that in an action against a set of persons in combination, a
 "conspiracy to injure, followed by actual injury, will give a good
 "cause for action, and motive or intent when the act itself is not
 "illegal is of the essence of conspiracy."

Lord Simon L.C.'s third proposition refers to what may be
 described as the primary form of the type of wrong held to be

³³ [1921] 3 K.B. 40, 84.

³⁶ [1898] A.C. 1.

³⁴ [1898] A.C. 1.

³⁷ [1901] A.C. 495.

³⁵ [1925] A.C. 700, 723.

actionable in *Lumley v. Gye*,³⁸ and in that form commonly designated "procuring or inducing a breach of contract."

This type of wrong was more broadly defined by Lord Macnaghten in *Quinn v. Leathem*,³⁹ where he said: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."

To this should be added Lord Lindley's statement of the law in the same case⁴⁰: "If the above reasoning is correct, *Lumley v. Gye*⁴¹ was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him."

We were referred to a great many more authorities, but no useful purpose will be served by multiplying citations, as the passages I have quoted sufficiently indicate the general principles of law to be applied.

After a full and elaborate argument, I am satisfied, first, that Lord Simon L.C.'s third proposition does not exhaustively define the type of actionable wrong to which it refers, as there may, on the principles stated by Lords Macnaghten and Lindley in *Quinn v. Leathem*,⁴² be an actionable interference with contractual rights where other means of interference than persuasion or procurement or inducement, in the sense of influence of one kind or another brought to bear on the mind of the contract breaker to cause him to break his contract, are used by the interferer; but, secondly, that (apart from conspiracy to injure, which, as I have said, is not in question so far as this motion is concerned) acts of a third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they were done with the object and intention of bringing about such breach.

With these two propositions in mind I turn to consider what

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³⁸ 2 El. & Bl. 216.

³⁹ [1901] A.C. 495, 510.

⁴⁰ Ibid. 535.

⁴¹ 2 El. & Bl. 216.

⁴² [1901] A.C. 495.

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The breach of contract complained of must be brought about by some act of a third party (whether alone or in concert with the contract breaker), which is in itself unlawful, but that act need not necessarily take the form of persuasion or procurement or inducement of the contract breaker, in the sense above indicated.

Direct persuasion or procurement or inducement applied by the third party to the contract breaker, with knowledge of the contract and the intention of bringing about its breach, is clearly to be regarded as a wrongful act in itself, and where this is shown a case of actionable interference in its primary form is made out: *Lumley v. Gye*.⁴³

But the contract breaker may himself be a willing party to the breach, without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference: see, for example, *British Industrial Plastics Ltd. v. Ferguson*,⁴⁴ where the necessary knowledge was held not to have been brought home to the third party; and *British Motor Trade Association v. Salvadori*.⁴⁵ The inconsistent dealing between the third party and the contract breaker may, indeed, be commenced without knowledge by the third party of the contract thus broken; but, if it is continued after the third party has notice of the contract, an actionable interference has been committed by him: see, for example, *De Francesco v. Barnum*.⁴⁶

Again, so far from persuading or inducing or procuring one of the parties to the contract to break it, the third party may commit an actionable interference with the contract, against the will of both and without the knowledge of either, if, with knowledge of the contract, he does an act which, if done by one of the parties to it, would have been a breach. Of this type of interference the case of *G.W.K. Ltd. v. Dunlop Rubber Co. Ltd.*⁴⁷ affords a striking example.

Further, I apprehend that an actionable interference would undoubtedly be committed if a third party, with knowledge of a

⁴³ 2 El. & Bl. 216.

⁴⁴ [1940] 1 All E.R. 479.

⁴⁵ [1949] Ch. 556.

⁴⁶ (1890) 45 Ch.D. 430.

⁴⁷ 42 T.L.R. 376.

✓ contract and intent to bring about its breach, placed physical restraint upon one of the parties to the contract so as to prevent him from carrying it out.

It is to be observed that in all these cases there is something amounting to a direct invasion by the third party of the rights of one of the parties to the contract, by prevailing upon the other party to do, or doing in concert with him, or doing without reference to either party, that which is inconsistent with the contract; or by preventing, by means of actual physical restraint, one of the parties from being where he should be, or doing what he should do, under the contract.

But here the acts complained of as constituting the actionable interference do not amount to a direct invasion of the plaintiffs' contractual rights. The plaintiffs' case, as regards paper, is that the defendants persuaded, induced or procured employees of Bowaters (that is, drivers employed by Bowaters Sales Company Ltd., and loaders employed by Bowaters Mersey Mills Ltd.) to break their contracts of employment by refusing to drive lorries loaded with, or to load lorries with, paper destined for the plaintiffs, with the object and intention of causing Bowaters to break, or making it impossible for them to fulfil, their contract for the supply of paper to the plaintiffs; and that the defendants did in fact, by the means I have stated, produce the intended result.

I have stated the plaintiffs' case in the only form in which (if made out on the facts) it can, in my view, be maintainable in law apart from conspiracy to injure; for I reject, as inconsistent with the authorities referred to at the beginning of this judgment, Mr. Beyfus' submission that it is unnecessary for him in order to make out his case to show that any acts wrongful in themselves were done by the defendants in order to bring about the breach of Bowaters' contract with the plaintiffs, provided they were done with the intention of causing and did in fact cause such breach; and, so far as I can see, the only acts wrongful in themselves, which there is any question of imputing to the defendants on the evidence, must consist in their having persuaded, induced or procured the employees concerned to break their contracts of employment.

I have not overlooked Mr. Beyfus' submission that there is evidence of direct persuasion or procurement or inducement of Bowaters to break the contract with the plaintiffs, but I do not agree that this is so, and will therefore deal with that part of Mr. Beyfus' argument when I come to examine the evidence.

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Now, the plaintiffs' case, as I have stated it, does seem to me to involve an extension of the range of actionable interference with contractual rights beyond any actual instance of this type of wrong to be found in the decided cases. Here there is no direct invasion of the plaintiffs' rights under the contract. It was no part of their contract that these particular employees, or any particular employees, should be employed by Bowaters for the purpose of effecting deliveries of paper to them. Thus the breaches by these men of their contracts of service with Bowaters (if made out on the facts) did not in themselves involve any breach of Bowaters' contract with the plaintiffs. The breaches of the contracts of service (if made out) were, so to speak, at one remove from the breach of contract complained of. Nevertheless, I think that in principle an actionable interference with contractual relations may be committed by a third party who, with knowledge of a contract between two other persons and with the intention of causing its breach, or of preventing its performance, persuades, induces or procures the servants of one of those parties, on whose services he relies for the performance of his contract, to break their contracts of employment with him, either by leaving him without notice or by refusing to do what is necessary for the performance of his contract, provided that the breach of the contract between the two other persons intended to be brought about by the third party does in fact ensue as a necessary consequence of the third party's wrongful interference with the contracts of employment.

I take this view because I see no distinction in principle for the present purpose between persuading a man to break his contract with another, preventing him by physical restraint from performing it, making his performance of it impossible by taking away or damaging his tools or machinery, and making his performance of it impossible by depriving him, in breach of their contracts, of the services of his employees. All these are wrongful acts, and if done with knowledge of and intention to bring about a breach of a contract to which the person directly wronged is a party, and, if in fact producing that result, I fail to see why they should not all alike fall within the sphere of actionable interference with contractual relations delimited by Lords Macnaghten and Lindley in *Quinn v. Leatham*.⁴⁸

But, while admitting this form of actionable interference in principle, I would hold it strictly confined to cases where it is

⁴⁸ [1901] A.C. 495.

clearly shown, first, that the person charged with actionable interference knew of the existence of the contract and intended to procure its breach; secondly, that the person so charged did definitely and unequivocally persuade, induce or procure the employees concerned to break their contracts of employment with the intent I have mentioned; thirdly, that the employees so persuaded, induced or procured did in fact break their contracts of employment; and, fourthly, that breach of the contract forming the alleged subject of interference ensued as a necessary consequence of the breaches by the employees concerned of their contracts of employment.

I should add that by the expression "necessary consequence" used here and elsewhere in this judgment I mean that it must be shown that, by reason of the withdrawal of the services of the employees concerned, the contract breaker was unable, as a matter of practical possibility, to perform his contract; in other words, I think the continuance of the services of the particular employees concerned must be so vital to the performance of the contract alleged to have been interfered with as to make the effect of their withdrawal comparable, for practical purposes, to a direct invasion of the contractual rights of the party aggrieved under the contract alleged to have been interfered with, as, for example (in the case of a contract for personal services), the physical restraint of the person by whom such services are to be performed.

I make the above reservations in regard to the scope of this newly propounded form of actionable interference with contractual rights for these reasons: It is now well settled that, apart from conspiracy to injure, no actionable wrong is committed by a person who, by acts not in themselves unlawful, prevents another person from obtaining goods or services necessary for the purposes of his business, or who induces others so to prevent that person by any lawful means. It follows, in my view, that (again apart from conspiracy to injure) there is nothing unlawful, under the law as enunciated in *Allen v. Flood*⁴⁹ and subsequent cases, in general appeals to others to prevent a given person from obtaining goods or services, for that is a purpose capable of being lawfully carried out, and there can, therefore, be nothing unlawful in advocating it, unless unlawful means are advocated. The result of such advocacy may well be that unlawful means are adopted by some to achieve the purpose advocated, but that is not to say that a person who advocates the object without

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⁴⁹ [1898] A.C. 1.

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advocating the means is to be taken to have advocated recourse to unlawful means. If by reference to the form of actionable interference with contractual rights now propounded, general exhortations issued in the course of a trade dispute, such as "Stop supplies to X," "Refuse to handle X's goods," "Treat X as 'black,'" and the like, were regarded as amounting to actionable interference, because persons reached by such exhortations might respond to them by breaking their contracts of employment and thereby causing breaches of contracts between their employers and other persons, and because the person issuing such exhortations must be taken constructively to have known that the employers concerned must have contracts of some kind or other with other persons, and that his exhortations (general as they were) might lead to breaches of those contracts through breaches of contracts of employment committed by persons moved by his exhortations, then, the proposition must be accepted, that it is an actionable wrong to advocate objects which can be achieved by lawful means, because they can also be achieved by unlawful means; and to that proposition I decline to subscribe.

Furthermore, as the judge in effect pointed out in his judgment, almost every strike, if to any extent successful, must cause breaches of contracts between the employer against whom it is directed and the persons with whom he is doing business, the very object of the strike being to bring his business to a standstill or himself to terms. Again, many a strike embarked on in support of a strike in progress in some other concern must have had for its immediate object the cutting off of supplies to, or prevention of distribution of the products of, or the application of similar pressure upon, that other concern.

Yet we have been referred to no case in which the persons inciting a strike have been held liable for actionable interference with contractual relations between the strikers' employers and the persons with whom they deal; and in principle I do not think that the inciters of the strike could be held so liable in the absence of proof that they knew of the existence of a particular contract, and, with a view to bringing about its breach, counselled action by employees in itself necessarily unlawful (as, for example, breach of their contracts of employment) designed to achieve that end.

To hold otherwise would, in my view, be to admit not only an addition to the means whereby actionable interference with contractual rights may be compassed (which addition, as I have said, I am in principle prepared to accept), but also an enlargement of the character and scope of the tort itself (which I cannot agree to).

Finally, not every breach of a contract of employment with a trading or manufacturing concern by an employee engaged in services required for the performance of a contract between his employer and some other person carries with it as a necessary consequence (in the sense above indicated) the breach of the last mentioned contract. For instance, A induces B, C's lorry driver, to refuse, in breach of his contract of employment, to carry goods which C is under contract to deliver to D, and does so with a view to causing the breach of C's contract with D. C could, if he chose, engage some other lorry driver, or arrange alternative means of transport, but does not do so. He fails to deliver the goods, telling D he is prevented from doing so by B's breach of contract. In such circumstances, there has been no direct invasion by A of C's rights under his contract with D, and, although A has committed an actionable wrong against C, designed to bring about the breach of C's contract with D, and a breach has in fact occurred, it cannot be said that the breach has in fact been caused by A's wrongful act, and therefore D cannot, in my view, establish as against A an actionable interference with his rights under his contract with C.

It remains briefly to relate the foregoing considerations to the facts of the present case. [His Lordship reviewed the evidence and held that the plaintiffs had not established a case against any of the defendants. He continued:] As regards Mr. Beyfus' allegation of a conspiracy amongst the defendants to do the various acts complained of as unlawful, I agree with my Lord that no such conspiracy is made out on the present evidence; and, in any case, I do not see how this allegation could assist the plaintiffs' claim for interlocutory relief, inasmuch as, on the evidence as it now stands, it does not appear to me that any unlawful act is brought home to any of the defendants, individually or collectively.

Following my Lord's example, I do not propose to express any view on the effect of the defence based on section 3 of the Trade Disputes Act, 1906, which for the present purpose is, so far as I can see, the only point of substance arising under that Act. This is obviously a question of difficulty, which, having regard to the view I have formed of the position at common law on the facts at present available, it is unnecessary, for the purposes of the motion, to decide one way or the other.

For the reasons I have endeavoured to state, I agree that this appeal fails and should be dismissed.

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MORRIS L.J. The decision in *Lumley v. Gye*,⁵⁰ which was argued on demurrer, was that the principle governing an action for enticing away servants could be applied if it were proved that a defendant procured the breach of a contract to give professional services. In discussing the principle, Erle J. expressed the view⁵¹ that "the procurement of the violation of a right is a "cause of action." In two of the counts of the declaration the word "maliciously" was used and in all three it was alleged that the defendant "enticed and procured" Miss Wagner.

When in *Quinn v. Leathem*⁵² Lord Macnaghten considered *Lumley v. Gye*⁵³ he approved it, and did so not on the ground of malicious intention, which he said was not the gist of the action, but on the ground that a ~~violation of legal right~~ committed knowingly is a cause of action. He said that it is a violation of legal right to "interfere" with contractual relations recognized by law, if there is no sufficient justification for the interference.

Lord Lindley also endorsed the decision in *Lumley v. Gye*,⁵³ and expressed himself as follows⁵⁴: "But a person's liberty or "right to deal with others is nugatory, unless they are at liberty "to deal with him if they choose to do so. Any interference with "their liberty to deal with him affects him. If such interference "is justifiable in point of law, he has no redress. Again, if such "interference is wrongful, the only person who can sue in respect "of it is, as a rule, the person immediately affected by it; another "who suffers by it has usually no redress; the damage to him is "too remote, and it would be obviously practically impossible and "highly inconvenient to give legal redress to all who suffered "from such wrongs. But if the interference is wrongful and is "intended to damage a third person, and he is damaged in fact—" "in other words, if he is wrongfully and intentionally struck at "through others, and is thereby damnified—the whole aspect of "the case is changed: the wrong done to others reaches him, his "rights are infringed although indirectly, and damage to him is "not remote or unforeseen, but is the direct consequence of what "has been done."

Then there follows shortly afterwards the passage in the speech of Lord Lindley to which my Lords have already referred. It is to be observed that Lord Lindley speaks of interference which is "wrongful" and of acts which are "wrongful."

⁵⁰ 2 El. & Bl. 216.⁵¹ Ibid. 232.⁵² [1901] A.C. 495.⁵³ 2 El. & Bl. 216.⁵⁴ [1901] A.C. 495, 534.

In tune with the opinions to which I have referred is the well established principle that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. In his speech in *Quinn v. Leathem*,⁵⁵ Lord Macnaghten expressed the view that the headnote to *Allen v. Flood*⁵⁶ might well have run in those words. In *Allen v. Flood*⁵⁶ Lord Herschell said⁵⁷: "It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect."

Clear guidance in these matters is afforded by the propositions formulated by Lord Simon L.C. in his speech in the *Crofter* case.⁵⁸

It is conceded in the present case that there is in existence a trade dispute. In so far as conspiracy is alleged, it is expressly disclaimed that there is any conspiracy or combination which has the injury of the plaintiffs as its real purpose. The motive or purpose of the defendants is to secure freedom for the employees of the plaintiffs to join a trade union and to dissuade the plaintiffs from continuing a ban on trade union membership, which the plaintiffs have for many years enforced.

With the competing viewpoints in regard to the controversy which is thus denoted, this court is not and cannot be in any way concerned. Though no combination wilfully to injure the plaintiffs is alleged, so as to be actionable on the basis of *Sorrell v. Smith*,⁵⁹ it is alleged that the defendants combined or conspired to commit the tort described in the writ as procuring a breach or breaches of contract.

When considering this part of the case, it may be useful to have in mind the words of Lord Lindley in the House of Lords in *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.*,⁶⁰ when he said in reference to the law of conspiracy: "But the possession of great power, whether by one person or by many, is quite as consistent with its lawful as with its unlawful employment; and there is no legal presumption that it will be or has been unlawfully exercised in any particular case. Some illegal act must be proved to be threatened and intended, or to have been committed, before any court of justice in the United Kingdom can properly make such conduct the basis of any decision."

⁵⁵ [1901] A.C. 508, 534.

⁵⁶ [1898] A.C. 1.

⁵⁷ *Ibid.* 123.

⁵⁸ [1942] A.C. 435, 442.

⁵⁹ [1925] A.C. 700.

⁶⁰ [1905] A.C. 239, 252.

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Much debate took place during the hearing in regard to the nature and definition of the tort which the plaintiffs allege was committed by the defendants. The words used by Lord Macnaghten, when expressing his reasons for approving the decision in *Lumley v. Gye*,⁶¹ were adopted in this court by Romer and Stirling L.JJ. in the *Glamorgan Coal Co.* case.⁶² Various words and phrases have been used at different times. Amongst them are the words "induce" and "procure." But the principle which underlies the matter is laid down by Lord Macnaghten and Lord Lindley. The tort is committed if a person without justification knowingly and intentionally interferes with a contract between two other persons. There must, therefore, be knowledge of the existence of contractual relations between others and the intentional commission, without justification, of some act which interferes with those contractual relations so as to bring about or procure or induce a breach resulting in damage. If A has a contract with B, the tort will be committed by X if there is a violation of the right B has under his contract by the intentional interference of X. If the contract between A and B is lawfully terminated, then there is no violation. In this context the notion of interference involves something wrongful. The breach of contract must be brought about or procured or induced by some act which a man is not entitled to do, which may take the form of direct persuasion to break a contract or the intentional bringing about of a breach by indirect methods involving wrongdoing. A clear illustration is furnished if X, with knowledge, persuades A to break his contract with B. The tort would also be committed if X, with knowledge, coerced A to break his contract. Infinite varieties of facts may occur calling for the application to them, when they are precisely ascertained, of the principles laid down. Thus if X, with knowledge and intention, forced A to break his contract with B by depriving A of his only possible means of performing the contract (as, for example, by removing the only available essential tools or by kidnapping a necessary or irreplaceable servant or by persuading a necessary and irreplaceable servant to break his contract) then probably in such cases the liability of X could be proved. In these illustrations I leave out of account the effect of the Trade Disputes Act, 1906.

Unless it is shown that some of the defendants combined and agreed together to do acts which included the commission of this tort, the inquiry resolves itself into considering how the matter

⁶¹ 2 El. & Bl. 216.⁶² [1903] 2 K.B. 545.

stands in regard to each defendant separately. In my judgment, that inquiry does so resolve itself.

[His Lordship shortly reviewed the evidence and held that there was no evidence that the defendants had procured any breach of contract, and continued:] In view of the conclusions which I have expressed, I do not find it necessary to deal with the question whether, if these defendants had induced the drivers to break their contracts of employment, the effect of section 3 of the Trade Disputes Act, 1906, would be to exclude such conduct from the category of wrongful interference.

Mr. Gardiner took certain additional points. He submitted that it must be shown that there is not a mere breach of contract, but a repudiation of it. He submitted that, if the main elements of the tort were established, the defendants could show that there was justification for their interference; that before the tort can be committed the particular terms of the contract must be known; that Bowaters did not in fact break their contract with the plaintiffs.

I do not find it necessary for present purposes to deal with these contentions. It may be that the evidence in regard to the contractual position between the plaintiffs and Bowaters is not yet in all respects complete and, save to such extent as is unavoidable, it is undesirable in litigation to which Bowaters are not parties and in which they have not been heard to express views as to the contractual position.

As my Lords have fully analysed the evidence, I do not feel that any useful purpose would be served by my referring further to it. I have reached the same conclusions as my Lords and I am in accord with the reasoning they have expressed in their review of the facts.

Appeal dismissed.

Leave to appeal to the House of Lords.

Solicitors: *Neish, Howell & Haldane; Pattinson & Brewer; Shaen, Roscoe & Co.; W. H. Thompson.*

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9, 21.Evershed M.R.,
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Revenue—“*Special Contribution*”—*Investment income*—*Annuity payable to trustee included in assessment*—*Trusteeship not an office of profit*—*Meaning of “earned income”*—*Annuity an “annual payment” not “earned income”*—*Income Tax Act, 1918* (8 & 9 Geo. 5, c. 40), s. 14 (3), *Sch. D, Case III, r. 1 (a)*, *All Schedules Rules, r. 19*—*Finance Act, 1920* (10 & 11 Geo. 5, c. 18), s. 33—*Finance Act, 1948* (11 & 12 Geo. 6, c. 49), ss. 47, 49, 68 (2).

Section 49 (1) of the Finance Act, 1948, provides that for the purpose of special contribution under that Act, “investment income” means income “from any source other than a source of “earned income. . . .” For the purposes of the Act of 1948 “earned income” has the same meaning as in the Income Tax Acts, that is, income which is earned income within the meaning of section 14 (3) of the Income Tax Act, 1918.

A testator by his will established a charitable trust, and directed that the trustees of the trusts should each receive £1,000 a year free of tax so long as they performed the duties of trustee. The trusteeship involved onerous and regular duties. One of the trustees was assessed to “special contribution” under section 47 of the Act of 1948, the assessment including as part of his “investment income” the remuneration which he was paid as a trustee under the trust. He appealed to the Commissioners for the Special Purposes of the Income Tax Acts against the assessment, contending that his remuneration as trustee was earned income, and therefore wrongly included in the assessment.

The commissioners held that they were bound by *Baxendale v. Murphy* [1924] 2 K.B. 494 and *Hearn v. Morgan* (1945) 26 Tax. Cas. 478, to hold that the remuneration was not earned income and that it was therefore investment income. Harman J. reversed their decision. On appeal by the Crown:—

Held, (1) that an office of profit is an office the tenure of which constitutes the title to the profit, in contrast to an office the tenure of which constitutes merely the condition upon which profit is derived from some other source of title. A trustee is the holder of an office but not the holder of an “office of profit.” The fact that the performance of his duties may qualify a trustee to receive some payment does not turn the office of trustee into an office of profit. It follows that any payment so made is not within the definition of “earned income” in section 14 (3) of the Income Tax Act, 1918. It is not remuneration from an office of profit under para. (a) of section 14 (3), nor is it income from property which forms part of the emoluments of an office of profit under para. (b) of that subsection. (2) That the payment received by the taxpayer as trustee was bounty given by the testator and not remuneration from employment and therefore it was an “annual payment” within Case III, r. 1 (a) of Sch. D of the Income Tax Act, 1918,

and also within the corresponding language of r. 19 (1) of the All Schedules Rules. The payment, accordingly, was outside the scope of Sch. E. (3) That it followed that the annuity received by the taxpayer as trustee was not "earned income" but was "investment income" and so subject to the special contribution imposed by the Finance Act, 1948.

Barendale v. Murphy [1924] 2 K.B. 494 followed.

In re Pooley (1888) 40 Ch.D. 1; *In re Thorley* [1891] 2 Ch. 613; and *In re White* [1898] 2 Ch. D. 217 applied.

Decision of Harman J. [1951] Ch. 893 reversed.

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APPEAL from Harman J.¹

A charitable trust known as the "Wellcome Trust" was established under the will of Sir Henry Wellcome, who died in 1936. He appointed five trustees whom he thought particularly qualified in various capacities to administer the trust. Sir Henry Dale, the appellant taxpayer, was appointed one of the trustees as being a person especially qualified in the medical and allied sciences. The testator gave to each of his trustees £1,000 a year free of tax "so long as he shall continue to act as trustee. . . ."

The trusteeship was subsequently settled by a scheme embodied in an order made in the Chancery Division on May 1, 1939. The scheme regulated the method of appointing new trustees, and each trustee was to be paid a sum at such a rate as, after the deduction of income tax at the standard rate and the provision of that part of the surtax payable by him which was attributable to this remuneration, left a clear sum of £1,000.

In performance of his duties as a trustee, the taxpayer did a considerable amount of work. He was provided with an office and secretary, and habitually spent two hours a day on the trust affairs. The trustees also met fortnightly to consider trust matters. The annuity payable to the taxpayer had always been taxed on the footing that it was taxable under Sch. D, Case III, r. 1 (a). He had never been separately assessed under Sch. E.

The taxpayer was assessed to "special contribution" under Part V of the Finance Act, 1948,² and the assessment included

¹ [1951] Ch. 893.

² Finance Act, 1948, s. 47 (1): "In the case of individuals whose total income for the year 1947-48 exceeds £2,000 and whose aggregate investment income for that year exceeded £250, there shall . . . be charged a special contribution. . ."

S. 49 (1): ". . . in this Part of this Act the expression 'investment income' means income from

"any source other than a source of earned income. . . ."

S. 68 (2): "Save as expressly provided in this Part of this Act, expressions used therein have the same meanings as in the Income Tax Acts."

Finance Act, 1920, s. 33: "In this part of this Act and in any subsequent enactment relating to income tax, except where otherwise

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as part of his aggregate investment income the sum of £1,446 paid to him as trustee. It was admitted that that amount represented a sum (together with appropriate additions in respect of income tax and surtax) received by the taxpayer from the trustees in the financial year 1947-48 as his remuneration as trustee of the Wellcome Trust.

The taxpayer appealed against the inclusion of this sum in his aggregate investment income on the ground that it was earned income and not investment income. The trustees of the will appealed against a notice given to them under section 60 (2) (a) of the Finance Act, 1948, being a notice stating the amount of contribution assessed on the taxpayer attributable to income received by him as a trustee. The taxpayer also appealed against a "like notice" given to him under section 60 (2) (a).

The Special Commissioners upheld the assessment, and decided that the sum in question was investment income for the purpose of special contribution.

Harman J. allowed the appeal of the taxpayer and of the trustees from that decision.

The Crown appealed.

Pennycuik Q.C. and *Sir Reginald Hills* for the Crown. If an annuity payable to a trustee as remuneration for his services has to be treated as taxable under Sch. E of the Income Tax Act, 1918, on the footing that it is remuneration from an "office or employment of profit," the result will be that income tax cannot be deducted from the annuity under rule 19 of the All Schedules Rules. Such a result would conflict with the principle

"expressly provided—the expression
"‘earned income’ means income
"which is earned income within the
"meaning of s. 14 of the Income
"Tax Act, 1918. . . ."

Income Tax Act, 1918, s. 14 (3):

"For the purposes of this section the
"expression ‘earned income’ means

"—(a) any income arising in respect
"of any remuneration from any
"office or employment of profit held
"by the individual . . . (b) any
"income from any property which is
"attached to or forms part of the
"emoluments of any office or employ-
"ment of profit held by the
"individual. . . ."

Rules applicable to Case III of
Sch. D: "1. The tax shall extend to

"—(a) any interest of money . . .
"or any annuity or other annual pay-
"ment . . . by virtue of any . . .
"will . . ."

All Schedules Rules, r. 19: "(1)
"Where any . . . annuity, or any
"other annual payment . . . is pay-
"able wholly out of profits or gains
"brought into charge to tax, no
"assessment shall be made upon the
"person entitled to such . . .
"annuity, or annual payment . . .
"and the person liable to make such
"payment . . . shall be entitled, on
"making such payment, to deduct
"and retain thereout a sum repre-
"senting the amount of the tax
"thereon. . . ."

of *Baxendale v. Murphy*,³ which in practically every other case operates to the detriment of the Crown. It is to the advantage of beneficiaries that an annuity payable to a trustee should not be treated as earned income, since income tax in that event could not be deducted.

The question is whether an annuity payable to a trustee is within the words "remuneration from any office or employment" "of profit" in section 14 (3) (a) of the Income Tax Act, 1918. It is submitted that the answer to that question is "No." A trusteeship is not an office of profit: *In re Pooley*,⁴ *In re Thorley*⁵ and *In re White*.⁶ If a testator or settlor provides for payment to the trustees he has appointed, that is an act of bounty and does not turn the trusteeship into an office of profit. The office of trustee can never be an office of profit.

The subject matter of charge under Sch. E is an office of profit. Case III of Sch. D is only applicable to pure income profit. Rule 19 of the All Schedules Rules only applies to a pure income profit under Case III of Sch. D. This annuity falls within Case III of Sch. D and accordingly the remuneration is investment income within section 47 of the Finance Act, 1948, and liable to the special contribution. [They referred to *Inland Revenue Commissioners v. Duke of Westminster*⁷ and *Jones v. Wright*.⁸]

There is a clear liability under the Finance Act, 1948, s. 47 (1), to pay the special contribution in the present case, unless the sum of £1,000 a year free of income tax and surtax payable to the taxpayer was rightly held to be earned income. A sum payable to a trustee for performing his duty as trustee is always regarded as a gift and not earned income: see *Hearn v. Morgan*⁹ and *Attorney-General v. Eyres*.¹⁰ It cannot make any difference that in this particular case the trustee had a large amount of work to do. Here the annual payment to each trustee was provided for under the will of Sir Henry Wellcome and it is taxable as being a benefit under the will and, as such, taxable under Sch. D, Case III, r. 1 (a), of the Income Tax Act, 1918. It can make no difference that the sum payable to each trustee was subsequently settled by a scheme.

J. Millard Tucker Q.C. and *F. N. Bucher* for the taxpayer. Harman J. was right in the view he took as to the application

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³ [1924] 2 K.B. 494.⁴ (1888) 40 Ch.D. 1.⁵ [1891] 2 Ch. 613.⁶ [1898] 2 Ch. 217.⁷ [1936] A.C. 1.⁸ (1927) 13 Tax Cas. 221.⁹ (1945) 26 Tax Cas. 478.¹⁰ [1909] 1 K.B. 723.

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of *Baxendale v. Murphy*¹¹ and in holding that in the present case the trustee held an office of profit, the annuity being remuneration arising from an office of profit and therefore earned income within the meaning of section 14 (3) of the Income Tax Act, 1918. It had been suggested that this would upset the position of all trustees as making their remuneration earned income. That would not be generally so, unless the beneficiaries had themselves to pay the trustees. Although they mention *Attorney-General v. Eyres*¹² the Special Commissioners held, on the authority of *Hearn v. Morgan*,¹³ that the trustees' remuneration was not received in respect of the performance of the duties of an office. If *Baxendale v. Murphy*¹⁴ was rightly decided, there is no reason why the remuneration of a trustee cannot be said to arise from an office as earned income. Under section 18 of the Finance Act, 1922, profits or gains from an office were made chargeable under Sch. E instead of Sch. D but the tax would still remain deductible under rules 19 or 21 of the All Schedules Rules. The basis on which the taxpayer received the money paid to him was that he was being paid for work done and not of its being a donation to him.

If remuneration is payable to the holder of an office, that office becomes an office of profit. Here there is an office with remuneration attached to it. The only provision relating to an office in the Income Tax Act, 1918, is in Sch. E. [They referred to *Watson v. Rowles*,¹⁵ *MacMillan v. Guest*¹⁶ and *Jones v. Wright*.¹⁷]

It is submitted that the taxpayer is performing an onerous office for which he was selected owing to his special qualifications. To say that the payment he receives is not earned income is fantastic.

It is submitted first that this is remuneration from "an office" or employment of profit" within section 14 (3) (a) of the Act of 1918. If that submission is wrong, it is submitted that the payment is within section 14 (3) (b) as income of "property" which is attached to an office of profit." If section 14 (3) is capable of applying, we ask the court to say that it does apply.

F. N. Bucher in the same interest.

Pennycuik Q.C. in reply. The issues here are in two compartments. First, what is the scope of section 14 (3) of the Act

¹¹ [1924] 2 K.B. 494.

¹² [1909] 1 K.B. 723.

¹³ 26 Tax Cas. 478.

¹⁴ [1924] 2 K.B. 494.

¹⁵ (1926) 11 Tax Cas. 171.

¹⁶ [1942] A.C. 561.

¹⁷ 13 Tax Cas. 221.

of 1918 construed in isolation from the schedules. Second, what is the effect of the schedules in construing section 14. If section 14 (3) is looked at by itself and applied to the office of a trustee, it is found that it does not apply because the office of a trustee is not an office of profit. The only profit of an office is a profit which springs from the office as its source. In the case of the office of a trustee, the tenure of the office does not give a title to the remuneration; it is merely a condition of its payment. [He referred to *In re Thorley*.¹⁸]

An office is not rendered an office of profit by reason of the fact that some benefit comes to the holder of the office from another source. A trustee has no expectation of profit, because he is not entitled to remuneration. The character of the office is not changed because a testator provides for payment to his trustee.

The position of a director is wholly different from that of a trustee. Under any ordinary kind of articles, a director has a right to remuneration. A director holds an office of profit.

Cur. adv. vult.

May 21. The following judgments were read:—

EVERSHED M.R. I am authorized by Birkett L.J. to say that he has read the judgment that I am about to deliver, and that he agrees with it.

The short question in this appeal is whether there has arisen a liability to the "special contribution" imposed by section 47 of the Finance Act, 1948, in respect of the remuneration of £1,000 per annum "free of duty and tax" payable to the taxpayer, Sir Henry Dale, as one of the trustees of the trust known as the Wellcome Foundation established by the will of the late Sir Henry Wellcome, by virtue of the terms of the will and in accordance with an order of the Chancery Division of the High Court made on May 1, 1939. The precise figures are not in dispute. It is agreed on both sides that the gross amount of the remuneration is £1,446, and there has, at all material times, in fact been paid annually to the taxpayer out of the income of the funds subject to the trusts of the Wellcome Foundation the net sum of £1,000, the balance of £446 being retained by the trustees in respect of the tax appropriate to the annual sum. It is also the fact that no separate assessment for income tax has ever been

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¹⁸ [1891] 2 Ch. 613.

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made upon the taxpayer under Sch. E or otherwise in respect of this annual sum. The "remuneration" so payable has been uniformly treated for this purpose as being in *pari materia* with other "remuneration" payable under a will or settlement to an individual trustee, namely, as falling within the scope of Case III of Sch. D to the Income Tax Act, 1918, and payable subject to deduction of the appropriate tax by virtue of rule 19 of the All Schedules Rules; in other words, "remuneration" to such a trustee has not hitherto been regarded as falling within the ambit of Sch. E.

The "special contribution" imposed by the Finance Act, 1948, is leviable (subject to the limitations specified in section 47) in respect of "investment income"; and that expression is, by the terms of section 49 (1) of the Act, defined as meaning "income from any source other than a source of earned income." Section 68 (2) of the Act of 1948 having made applicable for the purposes of that Act the definitions to be found in the Income Tax Acts, the meaning of the term "earned income" must be sought in section 14 (3) of the Income Tax Act, 1918, the definition in that subsection having been made generally applicable to the Income Tax Acts by section 33 of the Finance Act, 1920. So far as relevant the definition in section 14 (3) is: "(a) Any income arising in respect of any remuneration from any office or employment of profit held by the individual . . ." and "(b) Any income from any property which is attached to or forms part of the emolument of any office or employment of profit held by the individual. . . ."

It follows, accordingly, that the special contribution under the Act of 1948 is leviable in respect of the sum of income in question, unless that income is excluded from the impost on the ground of being "earned income" within the meaning of the Income Tax Acts. For the present I leave out of account any significance that may belong to the repeated use of the word "source" in section 49 (1) of the Act of 1948.

It is clear from the facts stated in the case that the selection of Sir Henry Dale as a trustee of the Wellcome Foundation depended on his special personal and professional qualifications. It is no less clear that the duties imposed on him by his trusteeship are by no means slight. The meetings of the trustees occur fortnightly, and it is found, as a fact, that the work involved occupies the taxpayer on an average for two hours of every day. According to the ordinary acceptance of our language the taxpayer indubitably "earns" his remuneration. By ordinary

standards of speech his £1,000 a year (net) would be aptly described as "earned income." It certainly could not by such standards be called appropriately "investment income." So the matter appealed, and appealed strongly, to Harman J., and for my part I greatly sympathize with his satisfaction in being able to reach a conclusion conformable to his sense of the propriety of the language.

But the matter is not, unhappily, as simple as it might (and perhaps should) appear. The question is not whether, according to common sense and popular terminology, the taxpayer has earned his remuneration; but whether, according to the proper interpretation of the Finance Act, 1948, the annual sum payable to him is exempted from the special contribution as falling fairly within the definition of "earned income" comprised in section 14 (3) of the Income Tax Act, 1918. I add that, if it be not so exempted, the levy falls, in the end, not upon him personally but, by reason of the terms of the will and section 56 of the Act of 1948, upon the trust premises out of which the annual sum is payable. For that reason the other trustees of the Foundation were joined as appellants before Harman J. and are joined as respondents in this court.

The main part of the argument before this court—and before Harman J.—was directed to paragraph (a) of the definition in section 14 (3) of the Act of 1918, and I turn accordingly first to it. Is the duty or office of a trustee entitled to remuneration under the terms of the instrument by which he serves an "office" or employment of profit" within the meaning of the paragraph and, if so, can his annual sum be properly described as "arising" "in respect of any remuneration from" that office? Since the case of *Attorney-General v. Eyres*,¹⁹ it is conceded by the Crown that a trusteeship of the character here in question is an "office"; so that the question is narrowed down to the inquiry, is the taxpayer's trusteeship an "office of profit"? And since, if the qualifying characteristic is attributable to the remuneration here in question, it must, to my mind, follow that the annual sum he receives must be income "arising in respect of any" "remuneration from" that office, the significance of the last mentioned words must lie, in my judgment, solely in the bearing that they have on the vital inquiry—is the office an office of profit?

The debate before us has in part been directed to the special

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¹⁹ [1909] 1 K.B. 723.

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characteristics belonging to remuneration payable to a trustee as such by virtue of the trust instrument and in part to the structure of the charging provisions of the Income Tax Acts, and particularly to the distinctions which (as it is said) must now be taken to have been established between Case III of Sch. D on the one hand and Sch. E (as the successor for certain purposes since section 18 of the Finance Act of 1922 of Case II of Sch. D) on the other. I have already said that for many years—and certainly since the case of *Baxendale v. Murphy*,²⁰ which the Special Commissioners regarded as binding them to decide the present case in favour of the Crown—remuneration payable to an ordinary individual trustee, as distinct from the charges which a professional trustee may, as such, be authorized to make, has been regarded as taxable only under the provisions of Case III of Sch. D and payable after deduction of tax in accordance with rules 19 or 21 of the All Schedules Rules.

The view of the effect of the Income Tax Acts reflected by this practice is undoubtedly advantageous to beneficiaries in the common case of a trust established by deed or will. The annual remuneration authorized by the trust instrument is paid to the trustee, net, out of the trust income which has suffered deduction of tax at the source; and the amount of the tax in respect of the annual sum is retained and becomes available for distribution among the beneficiaries. On the other hand, if such annual remuneration were properly chargeable under Sch. E (formerly under Case II of Sch. D), *prima facie* it would appear that the gross annual amount would have to be paid out of the already taxed income. In effect, income tax would be paid or deducted twice in respect of the annual sum in question; first, by reason of the fact that all the trust income would have suffered tax by deduction at the source and, second, because the recipient is himself chargeable in respect of the gross sum paid to him: and this is indeed, as I understand it, what occurs in practice, where a solicitor or other professional trustee is entitled to charge for his professional services in relation to the trust. The result is disadvantageous to the beneficiaries, who thereby lose the enjoyment of that portion of the gross annual sum attributable to tax which would otherwise be retained and distributed.

The court accordingly would, and should in my opinion, be slow to arrive at a conclusion in the present case which would be liable to disturb a long established practice operating to the

²⁰ [1924] 2 K.B. 494.

benefit of the persons interested in trust premises in the great majority of cases. The point was, therefore, naturally much pressed upon us by Mr. Pennycuik, and Mr. Millard Tucker referred to it as the argumentum in terrorem. But Mr. Millard Tucker sought to avoid the difficulty by challenging the validity of the proposition which I have indicated—that, if the trustees' remuneration were taxable under Sch. E, it would not be paid out of taxed income after deduction of tax in accordance with rule 19 of the All Schedules Rules: and it will be necessary to examine this matter more closely hereafter. But it is unfortunate, as I think, that on this matter the judge appears to have made a slip in the course of his judgment; for he said ²¹: “ Mr. Pennycuik argued that it is necessary to look first at sub-section (3) (a) of section 14 of the Income Tax Act, 1918. The words used there are ‘ remuneration from any office ’; and in order to be earned income it must be income arising from an office of profit. Under that Act all offices of profit, if they were private offices, were still chargeable to tax under Case III of Sch. D; and rule 1 of the Rules applicable to Case III of Sch. D provides: ‘ The tax shall extend to—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, . . . by virtue of any . . . will. . . . ’ That describes the payments received by trustees in this and in many other cases. This is an annuity or other annual payment payable by virtue of the will, and therefore chargeable, as Rowlatt J. held in *Baxendale v. Murphy*,²² under Case III of Sch. D, and not under Case II of Sch. D as the Crown had in that case claimed it to be. By section 18 of the Finance Act, 1922, profits or gains from an office, which under the Income Tax Act, 1918, had been chargeable under Sch. D, were transferred to Sch. E. It has been argued that, unless a direct assessment can be made under Sch. E, it cannot be an office of profit. With all respect to that argument, I cannot see why. *Baxendale v. Murphy*²² decided that Case III of Sch. D, which concerns annuities and leads on to rule 19 of the All Schedules Rules, applied to the remuneration of a trustee. After 1922, when these profits were transferred to Sch. E, they remained chargeable under rule 19, which in terms corresponds with the former cases under rules applicable to Case III of Sch. D. Although this is, as *Baxendale v.*

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²¹ [1951] Ch. 893, 897.²² [1924] 2 K.B. 494.

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“ *Murphy* ²² shows, and as *Hearn v. Morgan* ²³ confirms, a remuneration which is not assessable directly to tax under Sch. E, but remains subject to deduction of tax under rule 19, nevertheless I will not say that because of that fact it is not an office of profit. There is nothing which drives me to a conclusion so contrary to the dictates, as I think, of reason; and I decline to take that step.”

There can be no doubt that the reference to Case III of Sch. D at the beginning of the passage which I have quoted is a mistake for Case II of Sch. D; and I have felt unable to satisfy myself that the judge was not considerably influenced towards the comforting conclusion which he reached by the consequence which he treated as flowing from his erroneous premise.

In the circumstances it is, I think, important to concentrate first on the true meaning and effect of section 14 (3) of the Act of 1918. Consideration of the Schedules to the Act points to the consequences which properly result from the determination of the question of construction under section 14 (3): and it is no doubt true that, if the question of interpretation be doubtful, the nature of the consequences of one view or the other is proper to be considered in determining the matter of construction.

But I am disposed to think that to pay regard too much or too soon to the Schedules involves a risk of begging the question. I prefer, therefore, to attack the problem first, as I have intimated, by reference to the language of section 14 (3) itself and without regard to the Schedules.

I have referred already to the fact that trusteeship is admittedly an “office”: and the description is particularly appropriate to the derivation of that word. It is given to a large number of Englishmen in the course of their lives to serve at one time or another as trustees of other persons’ wills; so much so that the conception of trusteeship as a service or duty in which self-interest must be excluded has acquired an accepted place in public and national affairs. And if it offends common sense to say that Sir Henry Dale does not earn his £1,000 per annum from the Wellcome Foundation, it would, in my judgment; no less be regarded as startling and offensive to the proprieties to describe trusteeship as an “office of profit” or as a profession or vocation in any ordinary sense. And this conclusion depends on the strict and peculiar characteristics which have always been held

²² [1924] 2 K.B. 494.²³ 26 Tax Cas. 478.

by the court to belong to trusteeship. For it has been long established that, in the absence of some special dispensation, a trustee can never derive any profit or advantage for himself out of his trust and should be scrupulous to prevent any conflict between his duty and his interest. The strictness of the rule depends on the circumstance that the trustee is both master and servant at the same time, and, as regards any remuneration, necessarily combines the functions of payer and payee. So by the three cases in this court to which we were referred—*In re Pooley*,²⁴ *In re Thorley*,²⁵ and *In re White*²⁶—it has been laid down that remuneration made payable to a trustee by the terms of the instrument of trust is properly regarded as bounty on the part of the settlor or testator, in all material respects on the same footing as the bounty conferred on the other beneficiaries under the trust instrument and distinguished only from those others by the characteristic that acceptance of the obligation of the “office” is the condition on which the benefit may be taken. So, in the case of deficiency, the trustee can never compete with creditors for his remuneration but must (in the absence of some special priority conferred by the trust instrument) abate rateably with the claims of other beneficiaries; and so, in the case of a trust created by will, the remuneration was subject, like other legacies, to legacy duty.

It is this quality which, in my judgment, must be taken to lie at the root of the whole matter. For with whatever truth it may be said that a trustee in the position of Sir Henry Dale “earns” his reward or that a trustee in like position would, and could only be expected to, undertake the burden of the trust because of the expectation of that reward, still the distinction remains (and remains intelligible) between the duties of the office on the one hand and the independent benefaction, albeit conditional upon the assumption of those duties, on the other. The distinction may at first sight seem to be fine, but it rests on the peculiar and almost sacred character of trusteeship which the courts of equity have so jealously preserved. That character denies the existence of any true analogy between a trustee in regard to his remuneration on the one hand and a waiter or porter in regard to the gratuities which he expects, or a secretary of a corporate body in regard to the award ultimately made to him by the shareholders at the end, but by virtue of his labours

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²⁴ 40 Ch.D. 1.²⁵ [1891] 2 Ch. 613.²⁶ [1898] 2 Ch. 217.

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(as in the case of *Cowan v. Seymour*²⁷) on the other. For the latter occupations are of a character such as, of themselves, to entitle their holders to claim or expect reward. In the case of the trustee, though the assumption and discharge of the office may qualify the holder to receive some benefaction, the office itself involves a denial of any right to make a profit out of its performance.

Mr. Tucker sought to draw a parallel between the office of a director of a company and that of a trustee, on the ground that a director is, in the absence of provision to the contrary in the company's regulations, equally disabled from claiming any payment for his services. But, in my opinion, there is no true analogy. In the case of a company and one of its directors the fatal identity between payer and payee is absent. And even where the company's regulations provide that the director's remuneration is to be determined by a general meeting of shareholders, the director is entitled to expect such an award directly by virtue and as an incident of his office; and once the award has in fact been made, the director becomes a creditor of the company for its amount.

In my judgment, therefore, the office of trustee held by the taxpayer is in truth not an office of profit within the meaning of section 14 (3) (a) of the Income Tax Act, 1918. Put in another way (but it is the same thing), the remuneration to which he is entitled by virtue of Sir Henry Wellcome's will and the order of the Chancery Court is not income arising in respect of remuneration from such an office. In my judgment, the general language of Atkin L.J. applied to the case of the secretary in *Cowan v. Seymour*²⁷ is inapplicable to produce a similar result in the present case—and see the language of Younger L.J. in the same case.²⁸ A truer analogy—if analogies assist—would be found in the example given in argument of a treasurer or other officer of some charitable body strictly prohibited by the rules of the charity from making any charge for his services, but to whom, so long as he discharged his duties as such officer, a benevolent testator bequeathed an annuity; or in the case of an incumbent of some poorly endowed ecclesiastical office to whom a similar legacy had been given. Though it is unnecessary for me to decide any case but that now before the court, it would appear to me at any rate sensible to say that in neither of the cases supposed could the annuity or legacy (as the case may be)

²⁷ [1920] 1 K.B. 500, 511.²⁸ Ibid. 518.

be regarded as remuneration from an office of profit. And the case is the more striking, if the benefaction took the form of a single legacy rather than a recurring annuity.

In brief, therefore, I think that Mr. Pennycuick was well founded in the proposition which he submitted: an office of profit is an office the tenure of which constitutes the title to the profit, in contrast to an office the tenure of which constitutes merely the condition upon which profit is derived from some other source or title.

If I turn now to the Schedules to the Income Tax Act, 1918, it appears that the view which I have formed explains and justifies the practice which, as I have earlier said, has been uniformly followed at any rate since the case of *Baxendale v. Murphy*²⁹ was decided by Rowlatt J. in 1924. It must, in my judgment, be taken to be established that as regards any income or source of income the Schedules to the Act and the Cases thereunder are prima facie mutually exclusive; so that if any sum of income is from its character fairly within the ambit of Case III of Sch. D, it should be regarded as outside the scope of Case II of Sch. D or of Sch. E and vice versa. (See *per* Lord Atkin in *Fry v. Salisbury House Estate Ltd.*³⁰) And although rule 19 (1) of the All Schedules Rules cannot (from the fact of its location) be easily regarded as intended to be applicable only in respect of income assessable under Case III of Sch. D, its language undoubtedly reflects the wording of Case III, r. 1 (a), and, in a case such as the present, the natural conflict is between the application of Case III of Sch. D and rule 19 of the All Schedules Rules on the one hand and Case II of Sch. D or Sch. E on the other.

*Inland Revenue Commissioners v. Duke of Westminster*³¹ is a classic example of the antinomy. And though during the argument some examples were given of income assessable to tax otherwise than under Case III of Sch. D to which rule 19 of the All Schedules Rules might be applicable, none was satisfactorily suggested of income falling within the scope of Case II of Sch. D or Sch. E to which the machinery of rule 19 of the All Schedules Rules would be appropriate—unless it were the present case itself. It is, however, unnecessary, in my judgment, to express conclusions on all these general matters. If I have rightly defined the nature and quality, as understood by the law,

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²⁹ [1924] 2 K.B. 494.³⁰ [1930] A.C. 432.³¹ [1936] A.C. 1.

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of the remuneration payable to a trustee by virtue of the instrument of trust, it is to my mind clear that it is an "annual payment" within the meaning of Case III, rule 1 (a) of Sch. D, and (where it is paid out of a fund of income which has already suffered tax) also within the corresponding language of rule 19 (1) of the All Schedules Rules; and no less clear that it is outside the scope of Sch. E.

In *Baxendale v. Murphy*³² the sum of the trustee's remuneration in question related to a period before the transfer to Sch. E by section 18 of the Finance Act, 1922, had taken effect, so that the contest was between Case III and Case II of Sch. D. And it is no doubt significant that the word "office" did not occur in Case II, so that *Attorney-General v. Eyres*³³ was not cited to Rowlatt J. and the argument of the Crown was that the trustee's remuneration arose from an "employment." But it is, in my judgment, clear that Rowlatt J.'s decision at least proceeded on the basis that, having regard to the decisions of *In re Pooley*,³⁴ *In re Thorley*,³⁵ and *In re White*,³⁶ such remuneration was bounty and no more, and therefore an "annual payment" within the terms of Case III of Sch. D and also rule 19 of the All Schedules Rules. And the view has (as I have said already more than once) been consistently followed ever since in regard to such remuneration.

Mr. Tucker carefully avoided any challenge of the correctness of *Baxendale v. Murphy*³⁷ or of the practice since followed. But he sought to say first, that the situation had been materially changed by the effect of the Act of 1922 and that the case was accordingly no authority now against the view that a trustee's remuneration was remuneration from an office of profit so as to bring it squarely within the terms of Sch. E; and, second, that the result was nevertheless not to exclude the application of rule 19 of the All Schedules Rules, at any rate in a case in which the remuneration was in fact paid "out of profits or gains brought into charge to tax."

I have already said that in my judgment the principle of *Baxendale v. Murphy*³⁷ does not depend on the absence of the word "office" in Case II of Sch. D and that in any event the office of a trustee is not an "office of profit" so as to bring his remuneration within the ambit of Sch. E. And I have the greatest difficulty in accepting the view that remuneration

³² [1924] 2 K.B. 494.³³ [1909] 1 K.B. 723.³⁴ 40 Ch.D. 1.³⁵ [1891] 2 Ch. 613.³⁶ [1898] 2 Ch. 217.³⁷ [1924] 2 K.B. 494.

chargeable under Sch. E, as arising from an office of profit, could be subject to the application of rules 19 or 21 of the All Schedules Rules; for remuneration so chargeable would not, in my judgment, be "income chargeable as such," or what Lord Greene M.R. called "pure income profit" of the character appropriate to the application of rule 19. To my mind the distinction is well illustrated by the case of a professional trustee authorized by the trust instrument (in addition to any remuneration payable to him as a trustee merely) to charge for professional services. Such a case was that of *Jones v. Wright*,³⁸ also before Rowlatt J., for (as appears from Rowlatt J.'s judgment in that case) though the right of the solicitor trustee to send in his bill for professional services was derived from the benefit or privilege to that effect given to him by the testator, still the sum charged was remuneration for professional services and so formed part of his professional earnings in respect of which (subject to the appropriate deduction) he was liable to be independently assessed. The amount of the bill, in other words, is not "pure income profit" and has to be paid accordingly in full without any deduction in respect of tax under rules 19 or 21 of the All Schedules Rules.

I have earlier drawn attention to the passage in the judgment of Harman J. in which he is reported as stating that at the time of *Baxendale v. Murphy*³⁹ income from an office of profit fell within the scope of Case III of Sch. D; and from the reasoning of the following passage in the judgment it appears to me that he may have deliberately so intended. If the premise were correct, I should for myself find little difficulty in following the judge to his conclusion that the transfer of offices of profit to Sch. E in 1922 would not of itself affect the existing applicability in such cases of rule 19 of the All Schedules Rules. But it no less follows that if (as is conceded) the premise is incorrect, the judge might well not have reached the conclusion that he did.

I add that in my opinion the use of the word "source" in section 49 (1) of the Act of 1948 ("income from any source of "earned income"), to the significance (if any) of which I omitted to refer in the earlier part of this judgment, tends also to support the view which I have formed. It is an essential characteristic of the Income Tax Acts that attention is always directed to the "source" from which the income sought to be taxed is derived. In the case of a trustee entitled as such to remuneration by virtue of the trust instrument, it is, in my

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³⁸ 13 Tax Cas. 221.³⁹ [1924] 2 K.B. 494.

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opinion, both sensible and accurate to regard the "source" of his remuneration as being the bounty of the settlor or testator and his property held in trust rather than the "office" which, as I have tried to show, is characteristically not of itself productive of income or profit.

There remains only to consider Mr. Tucker's alternative submission that the remuneration in question is excluded from the operation of the Act of 1948, since it is earned income within the definition of section 14 (3) (b) of the Act of 1918, as being "income from any property which is attached to or forms part of the emolument of any office . . . of profit. . . ." If the view which I have expressed above is well founded, and the trusteeship is not an office of profit, it follows that paragraph (b) of section 14 (3) is necessarily inapplicable as well as paragraph (a); and it is unnecessary to pursue further this part of the argument. I think, however, that Mr. Tucker is in any case faced with further and formidable difficulties. In order to bring the case within the paragraph, it is necessary to hold that the office or the right to receive remuneration therefor is "property" within the meaning of the paragraph: and though it is unnecessary for me to express any concluded opinion, I am not satisfied that so artificial a meaning ought to be given to the word "property" in the paragraph.

The result is that I have reached a conclusion different from that entertained by Harman J., and I think that the appeal should be allowed. The result provokes a feeling of some regret and of doubt whether such an item of income as trustee's remuneration could have been intended by Parliament as a fit subject for the special contribution levied on "investment income." But it is my duty to construe the language of the statutes as best I can, and so applying myself I have felt compelled to the view which I have stated.

ROMER L.J. I agree entirely with the conclusion at which the Master of the Rolls has arrived in this case, and with the reasons upon which that conclusion is based. I feel, however, that the contention of the Crown is, at first sight, so contrary to the view which would commend itself to the man in the street, that I should like to endorse specifically the explanation of our decision which my Lord has already given.

The testator in this case had established an organization of considerable importance and, during his lifetime, enrolled the services of men who, by experience and qualification, were

peculiarly fitted to the task of supervising and controlling it after his death. One of these men was Sir Henry Dale, whose talents in his particular field are admittedly of the highest order. Those talents were secured by the testator for the Wellcome Foundation on terms of reasonable remuneration, for few people can afford, in these days, to give their services for nothing. The remuneration accorded to Sir Henry Dale by the will was £1,000 per annum free of tax, and, having regard to the quality of his ability and the work which his acceptance of the trusteeship has involved, no one would say that that remuneration was excessive. It is nevertheless regarded by the Crown, for purposes of the special contribution, as not falling within the description of "earned income," and in our opinion the Crown is right; if, then, Sir Henry's remuneration is not earned income, the ordinary man would suppose that this court has held it to be income that Sir Henry has not earned, and his sense of justice would, in the absence of explanation, be affronted accordingly.

In deciding that Sir Henry's remuneration is not "earned income," we are merely applying a principle that was laid down very many years ago and which it is too late now for this court to disturb. The principle is simple: The office of trustee is, par exemple, an office of honorary service and not an office of profit—so much so indeed that if a trustee makes a profit out of his trusteeship he gets into serious trouble; if, therefore, a testator attaches remuneration to the trusteeship of his will such remuneration is wholly benefaction. From this it follows that the remuneration accorded to Sir Henry Dale is bounty and nothing else, and the bounty derives from the testator and not from the office of trustee. Accordingly, the remuneration cannot be described as "income arising in respect of any remuneration from an office . . . of profit." It may well be that posterity will think that the courts went too far in holding that remuneration expressly allowed to a trustee for his services should be regarded as wholly bounty; and that a more realistic approach to the position would have been to put an assessment on the value of the services which the trustee was to render to the trust and then compare that assessment with the value of the remuneration. If the remuneration was worth more than the annual value of the services, the difference, and that only, should be treated as a legacy. If that method had been applied to the case of Sir Henry Dale, it would be found, I imagine, that his services to the trust are worth at least (if not more than) the amount of his

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annual remuneration, and that consequently no part of that remuneration could, for any purpose, be regarded as gratuitous. By such a standard the Crown's claim to exclude the remuneration from the category of "earned income" could not succeed. On this, however, two observations must follow: (i) Such an approach to the remuneration of a trustee, however valuable or indeed essential he may be to any particular trust, is inconsistent with principles of long standing which are binding on this court, and (ii) the approach, if adopted, would be disastrous to trusts in general for the reasons to which the Master of the Rolls has referred, namely, that, as a necessary and logical result, a trustee's remuneration would have to be paid without deduction of tax from trust income which had already been brought into charge.

Although, therefore, the taxpayer's remuneration is entitled to be regarded, from any ordinary standpoint, as earned in the fullest sense, it does not conform to the specialized description of "earned income" for the purposes of the Income Tax Act, 1918, and section 49 of the Finance Act, 1948; and it is with those purposes, and those alone, that we are concerned in the present appeal.

Appeal allowed.

Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Markby, Stewart & Wadesons.*

B. A. B.

HARMAN
J.

In re HURLL, DECED. ANGELINI v. DICK AND OTHERS.

[1951 H. No. 2652.]

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June 19, 20.

Legitimation—Child born out of wedlock—Domicile of father Italian—Subsequent marriage of parents—Will—Operation before legitimation—Whether child entitled to take under will as legitimate child of his mother—Legitimacy Act, 1926 (16 & 17 Geo. 5, c. 60), s. 8.

Will—Legitimation—Domicile—Gift in trust for children—Child born out of wedlock—Foreign domicile of father—Subsequent marriage of parents—Will coming into force before legitimation—Child entitled to take under the will.

A testator settled one-third of his residuary estate on his daughter A for life with remainder to her children. The testator died in October, 1939. In 1943 A gave birth to an illegitimate

child the father of whom was a bachelor, and a domiciled Italian. In 1949 A married the father in London. Legitimation by subsequent marriage is recognized by the law of Italy.

On a summons taken out to have determined whether the child was entitled to share in the testator's residuary estate:—

Held, that as the child's father was a domiciled Italian both at the date of the child's birth and at the date of his marriage with the child's mother, the child was recognized as legitimate by the common law and was not a person recognized as having been legitimated under section 8 (1) of the Legitimacy Act, 1926. That section only added to the class of persons whom English law would recognize as legitimated by the subsequent marriage of their parents by dispensing with the condition, imposed by the common law, that the father should be domiciled in a country which recognized legitimation by subsequent marriage at the date of the child's birth as well as at the date of his marriage with the child's mother: and in no way affected the position of a person who was regarded as legitimate by the common law. The child therefore was not affected by the provisions of section 8 (2) of the Act, and took under the will as the legitimate child of the testator's daughter, notwithstanding that the will had come into operation before he was legitimated.

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Peter Hurl, by his will dated March 24, 1934, left one-third of his residuary estate on trust for his daughter Agnes during her life and after her death "in trust for all the children or any the child of my said daughter who being male shall attain the age of 21 years or being female shall attain that age or previously marry and if more than one in equal shares absolutely. . . ." There was nothing in the will to exclude the statutory power of advancement. The testator died on October 6, 1939.

The testator's daughter Agnes was married to an Italian in 1933, and at the date of the will she had acquired an Italian domicile. There were no children of that marriage, which was annulled in January, 1943, by the Ecclesiastical Tribunal of the Sacred Rota and approved by the Royal Court of Appeal in Florence in April, 1943.

In 1942 the daughter was interned in Italy in the town of Perugia, and during that time she formed an association with an Italian, one Giovanni Angelini; as a result of that association she gave birth to a child on July 2, 1943. The child was registered with the appropriate official in Perugia as being the child of Giovanni Angelini and the daughter. Giovanni Angelini was a bachelor at the time of the birth and of the conception of the child. The daughter was married to her first husband at the time

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of the conception, although the marriage had been annulled at the time of the birth.

On October 14, 1949, Giovanni Angelini and the daughter were married in London. That marriage was annulled on January 26, 1951, on the grounds of the wilful refusal of Giovanni Angelini to consummate it. The parties had had only one child, who was the infant plaintiff, Patrizio Giovanni Pietro Angelini. The daughter had remarried, but there were no issue of that marriage.

The question on the summons was whether the plaintiff was entitled to rank as the legitimate child of the daughter for the purpose of qualifying as the object of the statutory power of advancement applicable to her share under her father's will.

H. A. Rose for the trustees of the testator's will.

Geoffrey Cross Q.C. and *Claud Allen* for the infant plaintiff. The plaintiff claims to be legitimated by common law; his father was domiciled in Italy at the date of his birth and at the date of the subsequent marriage: see Dicey's *Conflict of Laws*, 6th ed., rule 121, p. 496, and note 87, p. 497. Reliance is not placed on section 8 of the Legitimacy Act, 1926,¹ because the plaintiff could not take under the testator's will which came into operation after the Act of 1926 but before the date of the plaintiff's legitimation.

The plaintiff's case is based on rule 121 of Dicey and the cases founded on it: see *In re Goodman's Trusts*²; *In re Andros*³ and *In re Grey's Trusts*.⁴ The dates in the last case are similar to those in the present case.

¹ Legitimacy Act, 1926, s. 3:
“ . . . a legitimated person . . .
“ shall be entitled to take any
“ interest . . . (b) under any dis-
“ position coming into operation after
“ the date of legitimation. . . .”

S. 8: “ (1) Where the parents of
“ an illegitimate person marry or
“ have married one another, whether
“ before or after the commencement
“ of this Act, and the father of the
“ illegitimate person was or is, at the
“ time of the marriage, domiciled in
“ a country, other than England or
“ Wales, by the law of which the
“ illegitimate person became legiti-
“ mated by virtue of such subsequent
“ marriage, that person, if living,
“ shall in England and Wales be

“ recognized as having been so legiti-
“ mated from the commencement of
“ this Act or from the date of the
“ marriage, whichever last happens,
“ notwithstanding that his father was
“ not at the time of the birth of such
“ person domiciled in a country in
“ which legitimation by subsequent
“ marriage was permitted by law.
“ (2) All the provisions of this Act
“ relating to legitimated persons and
“ to the taking of interests in property
“ by . . . a legitimated person . . .
“ shall apply in the case of a person
“ recognized as having been legiti-
“ mated under this section. . . .”

² (1881) 17 Ch.D. 266.

³ (1883) 24 Ch.D. 637.

⁴ [1892] 3 Ch. 88.

It was made clear in *In re Askew*⁵ that legitimacy at common law is different from legitimacy under the Act of 1926. But the plaintiff is not driven to rely on the Act at all, because he could rely on legitimacy at common law, his father having an Italian domicile at the date of his birth and of his subsequent marriage. It is submitted that on the evidence legitimacy at common law is established.

J. F. Bowyer for the sister of the daughter Agnes. The plaintiff's claim that he still retains his legitimacy by virtue of the common law is denied. It is admitted that the plaintiff was legitimated under Italian law, and also that if the Act of 1926 had never been passed the plaintiff could have established in this court his right to take under the testator's will. But it is contended that section 8 of the Act cuts down his interests so that the plaintiff must be "recognized as having been legitimated" within the meaning of subsection (2) of section 8; that depends on the court's interpretation of subsection (1) of section 8. The only question is whether the last three lines of subsection (1) have the effect of limiting the application of the section to a narrower class of those persons whose fathers were not domiciled at the date of their birth in a country recognizing legitimation by subsequent marriage; or whether it applied to a larger class, persons whose fathers may or may not have been so domiciled, which would include the plaintiff. It is submitted that the latter is the correct construction. *In re Askew*⁵ has no bearing on this point.

Pennycuik Q.C. and *W. F. Waite* for the sister's infant children adopted the argument of *Bowyer*, and referred to *In re Luck's Settlement Trusts*,⁶ and section 8, section 1 (3) and section 3 (1) of the Act of 1926.

Cross Q.C. in reply. The Legitimacy Act merely puts a certain class of persons in a better position than they were before, leaving a person like the plaintiff in the same position as he was before. Section 8 should be construed as conferring rights on persons who did not have them before rather than taking them from people who already had them.

The mother of the plaintiff and the testator's widow were defendants to the summons but were not represented and did not appear.

HARMAN J., having stated the facts, continued:—The question that I have to decide is whether the infant plaintiff is entitled to

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⁵ [1930] 2 Ch. 259.

⁶ [1940] Ch. 864.

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a contingent interest in remainder in his mother's settled share; and is an object of the power of advancement applicable by virtue of the statute.

It is admitted that if the Legitimacy Act, 1926, had never been passed the plaintiff would have been considered for this purpose as the legitimate son of his parents. That is the result of the authorities preceding the Act of 1926, and notably of *In re Grey's Trusts*.⁷ In that case the testator died in the year 1860. The marriage which legitimated the boy in question was in 1880 and the boy was born in 1877, that is to say, long after the testator's death. He became legitimate in 1880 when the testator had been dead for 20 years. The headnote is in these terms: "The rule laid down in *Doe v. Vardill*,⁸ that a "child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit land in England, "relates only to the case of descent upon an intestacy, and does "not affect the case of a devise of real estate to 'children.' "Accordingly, where a testator specifically devised real estate "and bequeathed personal estate to trustees upon trust for his "son for life, and, after the death of his son, for all his son's " 'children' in equal shares:—*Held*, that a child of the son, "born out of wedlock, but legitimated according to the law of "the son's domicile by the subsequent marriage of its parents, "was entitled to share with a child born after the marriage in "both the realty and personalty." It was admitted there that there would have been a right to share in the personalty, and I cite the case to show that it does not matter that the child should be born after the relevant instrument came into operation.

Stirling J., in *In re Grey's Trusts*,⁹ considered the earlier case of *In re Andros*,¹⁰ and cited the following passage from the judgment of Kay J. in that case¹¹: "The law, as I understand it, is "that a bequest of personalty in an English will to the children "of a foreigner means to his legitimate children, and that by "international law, as recognized in this country, those children "are legitimate whose legitimacy is established by the law of "the father's domicile. Thus ante nati whose father was domiciled in Guernsey at their birth, and subsequently married "the mother so as to make the ante nati legitimate by the law "of Guernsey, are recognized as legitimate by the law of this "country, and can take under such a gift.'"

⁷ [1892] 3 Ch. 88.

⁹ [1892] 3 Ch. 88.

⁸ (1835) 2 Cl. & F. 571; (1840)

¹⁰ 24 Ch.D. 637.

7 Cl. & F. 895.

¹¹ [1892] 3 Ch. 88, 92.

The father of the plaintiff here was at all material times a domiciled Italian and was, therefore, at the date of the plaintiff's birth and at the date of his marriage with the plaintiff's mother domiciled in a country where legitimation by subsequent marriage is recognized in circumstances which exist here. Before 1927, therefore, the plaintiff would have been an object of this power.

A person who would not have been an object of this power would have been a person born out of wedlock whose father, though at the time of his subsequent marriage with the mother he was domiciled in a country which recognized legitimation per subsequens matrimonium, was not in that position at the date of the birth of that person. It was always necessary under the common law for the father to have been domiciled in such country at both dates.

With those circumstances in mind I must examine the Legitimacy Act, 1926, which, as is well known, makes legitimation per subsequens matrimonium for the first time part of the law of England in the case of persons of English domicile. Section 1 (1) provides: "Subject to the provisions of this section, where "the parents of an illegitimate person marry or have married one "another, whether before or after the commencement of this "Act, the marriage shall, if the father of the illegitimate person "was or is at the date of the marriage domiciled in England or "Wales, render that person, if living, legitimate from the com- "mencement of this Act, or from the date of the marriage, "whichever last happens." That does not apply to the present case because the father was not domiciled in England or Wales. Subsection (3) is in these terms: "The legitimation of a person "under this Act does not enable him or his spouse, children or "remoter issue to take any interest in real or personal property "save as is hereinafter in this Act expressly provided." Thus, legitimated persons can only take such interests in property as the Act expressly confers upon them; this is effected by section 3, which provides: "Subject to the provisions of this Act, a "legitimated person and his spouse, children or more remote "issue shall be entitled to take any interest—. . . (b) under any "disposition coming into operation after the date of legitima- "tion. . . ." A legitimated person is defined by section 11 as "a person legitimated by this Act," and by subsection (2) of section 8 "this Act shall have effect as if reference therein to a "legitimated person included a person . . . recognized as having "been legitimated" under that section. For the purposes of

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this case section 8 is the important section, but before considering it I will refer to section 10: “ (2) Nothing in this Act shall affect “ the operation or construction of any disposition coming into “ operation before the commencement of this Act, or affect any “ rights under the intestacy of a person dying before the com- “ mencement of this Act.” If, therefore, the testator had died before January 1, 1927, this child would, admittedly, have continued to be entitled to the rights which the law would have given him before that date; but the will came into operation after the Act, so that that section does not save his rights if they are not saved otherwise.

The Act, so far as I have recited it, is confined to persons having a father domiciled in England at the date of the marriage, and it is obviously recognized that there might be another class of persons who, if special provision were not made for them, would be excluded from its benefits, namely, persons whom the Act did not legitimate by reason of the fact that the father, at the date of the birth of the child, was domiciled in some other country which did not recognize *legitimatio per subsequens matrimonium*. That class of persons would have been an obvious case of omission if the Act had not provided for them, and provision is made for them by section 8, which is in these terms: “ (1) Where the parents of an illegitimate person marry or have “ married one another, whether before or after the commence- “ ment of this Act, and the father of the illegitimate person was “ or is, at the time of the marriage, domiciled in a country, other “ than England or Wales, by the law of which the illegitimate “ person became legitimated by virtue of such subsequent “ marriage, that person, if living, shall in England and Wales “ be recognized as having been legitimated from the commence- “ ment of this Act or from the date of the marriage, whichever “ last happens. . . .” So far, all that seems to apply to the plaintiff, but the section continues: “ notwithstanding that his “ father was not at the time of the birth of such person domiciled “ in a country in which legitimation by subsequent marriage was “ permitted by law.”

If those last words cut down the category of people with whom the section is concerned, and limit it to persons whose father was not at the date of their birth domiciled in a country which recognized *legitimatio per subsequens matrimonium*, then it has no application to the plaintiff because his father was a domiciled Italian at all times. If, however, the section applies not only to that class but to the wider class of people whom the

law recognized here, before the Act, as legitimate, then it may be said that the plaintiff, although he would have been regarded here as legitimate before 1927, must now rank with those who are legitimated (if at all) by the Act of 1926.

Prima facie I should have expected this Act to confer legitimacy on certain persons who were not legitimate before. It does so for persons whose father was domiciled in England and Wales without doubt, and also for a person whose father, though domiciled in England when the child was born, was domiciled elsewhere when he married. It is said that it also confers the kind of legitimacy provided by the Act on the further class of persons and, as it were, recognizes them again as legitimate. Mr. Pennycuik argued that it did not matter whether that was said *per incuriam* or not. His submission was that it was done in order that there should not be an anomalous class of people—better off, as it were, than those legitimated by the Act. Whether the legislature envisaged all possibilities, or whether, indeed, they have all been envisaged by anybody arguing this case, or by myself, I do not know. In this complicated kind of legislation the only thing is to construe the actual language of the Act and to disregard the consequences unless they are patently clear.

It seems to me that the class of people to be affected by section 8 must be ascertained from a consideration of the whole of the section. One of the qualifications is that the father of the person was not at the date of that person's birth domiciled in a country which recognized *legitimatio per subsequens matrimonium*. That being so, the plaintiff does not come within the class affected by the section.

The other view is that "notwithstanding" means whether his father was or was not so domiciled at the time of his birth. That seems to me to be a slight perversion of the meaning of the language used. That view also involves using the word "recognized" in a very odd sense because, if a person is already recognized by law as legitimate, it is odd that you should find him recognized under the section. The difference, of course, is that if this child ought to be regarded as within the class legitimated by the Legitimacy Act, he would not be an object of the power, because the instrument came into force before his birth. But if he had rights before (as admittedly he had), and kept them, he is under no compulsion to have recourse to the enabling Act and can stand on what Dicey calls his common law rights.

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Having been regarded by the common law as legitimate before 1927, I do not think that section 8 of the Act has the effect of depriving him of those rights and including him in a new category having slightly less privilege than the old. It may be that that produces some anomaly, but that is immaterial, and I regard the language on the whole as having the narrower construction, which would leave out the plaintiff and those in his position as not being in need of the safeguard which the section was intended to bring to a narrower class of persons who were not regarded as legitimate by the common law. I hold, therefore, that the plaintiff is entitled to be regarded as a child of the marriage of his parents, and entitled to share as a child of the defendant Agnes in the one-third share of the testator's residuary estate settled on her for life, with remainder to her children.

Declaration accordingly.

Solicitors: *Cardew Smith & Ross; Piesse & Sons.*

I. G. R. M.

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July 4.

[1951 M. 2628.]

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National Health Service—Hospital vested in local authority—Lease of hospital to Joint Hospital Board—Fee simple reversion vested in local authority—Interest vested in Minister of Health—National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81), s. 6 (2).

In 1943 the Stafford Corporation, which had been carrying on an isolation hospital on freehold land owned by it, entered into an agreement with the Mid-Staffordshire Joint Hospital Board, set up pursuant to the Public Health Act, 1936, and the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938, under which the Board obtained a tenancy for 10 years from October 1, 1941, of the property, with an option to renew the tenancy for a further 10 years. The board was a local authority by virtue of section 79 of the National Health Service Act, 1946, and obtained the lease in order to carry on an isolation hospital. The leasehold tenancy therefore vested in the Minister on the appointed day by virtue of section 6 (2). A summons was taken out by the Minister asking whether there also vested in him the fee simple reversion belonging to the corporation:—

Held, that the reversionary interest did not vest in the Minister under section 6 (2) of the Act. Even assuming that the words "all hospitals vested in a local authority" in the subsection included legal and equitable interests in the land and premises on which the activities of the hospitals were conducted, the reversionary interest of the Stafford Corporation was not within that scope. The word "vested" as read in the subsection indicated the ownership of a proprietary interest in part of the hospital undertaking; but the language of the subsection, which was in conformity with the heading of the section, "Transfer of hospitals to the Minister," did not include a reversionary interest belonging to a local authority which was not itself carrying on the hospital or providing the hospital services.

Decision of Danckwerts J. reversed.

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APPEAL from Danckwerts J.

In 1880 the defendants, Stafford Corporation, acquired freehold land which was the site of a hospital known as the Tithe Barn Hospital subsequently erected on it in 1907. The hospital was used from then for the purposes of an isolation hospital. On May 27, 1943, the corporation entered into an agreement with the Mid-Staffordshire Joint Hospital Board set up pursuant to the Public Health Act, 1936, and the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938, under which the Board acquired a tenancy for 10 years from October 1, 1941, of the property in question for the purposes of an isolation hospital, with an option to renew the tenancy for a further 10 years at the end of the original term. By virtue of the provisions of the National Health Service Act, 1946, the leasehold term vested in the Minister on the appointed day, July 5, 1948.

On August 10, 1951, a summons was taken out asking whether there also vested in the Minister the fee simple reversion retained by the corporation. Danckwerts J. held that the fee simple reversion vested in the Minister under section 6 (2) of the Act of 1946.¹ It had been urged that, if the fee simple vested in the Minister, this resulted in depriving the corporation, without compensation, of property which might be used for purposes other

¹ National Health Service Act, 1946, s. 6 (2): "Subject to the provisions of this Act, there shall also, on the appointed day, be transferred to and vest in the Minister by virtue of this Act, all hospitals vested in a local authority immediately before the appointed day, and

"all property and liabilities held by a local authority, or to which a local authority were subject, immediately before the appointed day, being property and liabilities held or incurred solely for the purposes of those hospitals or any of them."
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than those of a hospital. In his judgment, he must apply the words of the subsection and hold that where there was any interest in land used for the purposes of a hospital immediately before the appointed day, the subsection transferred to the Minister the interests in that land which were vested in a local authority. While the result was surprising, he had come to the conclusion, invoking the provisions of the Interpretation Act, 1889, that the subsection was applicable to two or more local authorities.

The corporation appealed.

Geoffrey Cross Q.C. and *J. V. Nesbitt* for the Stafford Corporation. This appeal involves a short question of the effect of section 6 (2) of the National Health Service Act, 1946. On the appointed day one local authority, the Mid-Staffordshire Joint Hospital Board, was using hospital premises held by it for a term of years as an isolation hospital and the freehold reversion in the premises was then vested in another local authority, the Stafford Corporation. It is submitted that while section 6 (2) operated to vest the leasehold interest in the Minister of Health, Danckwerts J. was wrong in holding that the freehold reversion also vested in him. On the appointed day the reversion was held by the Stafford Corporation for its general purposes. The reversion was not being used by it for hospital purposes and the Act did not divest it of the reversion. When the lease came to an end the corporation was free to use the land for any lawful purposes. There is no justification for treating the property as being solely for the use of the hospital. Section 6 (2) provides, it is true, for the vesting in the Minister of "all hospitals vested in a local authority" and "all property . . . held by a local authority . . . being property . . . held . . . solely for the purposes of "these hospitals." How then can property, not held solely for the purposes of these hospitals but so held only while the lease continues, vest in the Minister under the subsection? The reversion on land used as a hospital during the term of the lease belongs to the corporation and can on no ground vest in the Minister.

Sir Lionel Heald A.-G. and *Denys Buckley* for the Minister of Health. The judge was, it is submitted, clearly right although it was contended for the corporation that his decision involved an anomaly. Of course it seems primarily an anomaly that the local authority's land on which the hospital stands should be vested in the Minister, but that was the result of the Act of 1946, whatever hardship this may involve. That is the effect of section 6 (2). The definition of hospital in section 79 (1) of the

Act as extended by section 9 show that the word "hospital" is to be read in the broadest manner and the land on which the hospital stands is included in the words "all hospitals." If not why does section 6 (2) go on to include "all property and liabilities"? There can be no reason why both the freehold interest and the leasehold interest in the hospital should not vest in the Minister.

Denys Buckley on the same side. If the court will look at the schedule to the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital) Act, 1938 (2 & 3 Geo. 6, c. v), it will be seen that while the Joint Board created thereunder is by paragraph 3 (1) of the Order for the purpose of the provision of hospital accommodation for infectious diseases other than smallpox, the Stafford Corporation retained a part in the management of the hospital. This is shown by paragraph 4 (1), which gives the corporation four members on the Board; paragraph 11, which empowers the corporation to make orders for the admission of persons to the hospital, and paragraph 13, which provides for their contributing financially for the purpose of defraying the expenses of the Board. This shows that the hospital is being partly carried on by the corporation and provides a ground for saying the freehold reversion vests in the Minister. Although it is possible to suggest cases which would look badly, any likely case would be just such as the present one.

Geoffrey Cross Q.C. in reply.

Cur. adv. vult.

July 4. *EVERSHED M.R.* I have had the advantage of seeing the judgment which has been prepared by *Romer L.J.* I entirely agree with it and have nothing that I wish to add for myself.

BIRKETT L.J. I have had the same opportunity; and I, too, agree and have nothing to add.

ROMER L.J. The question for determination in this case is whether the freehold interest in the site of a hospital in Stafford known as the Tithe Barn Hospital has become vested in the Minister of Health by reason of the passing of the National Health Service Act, 1946. *Danckwerts J.* has answered this question in the affirmative, and the defendant corporation, who were the owners in reversion of the freehold immediately before the appointed day under the Act (July 5, 1948), have appealed against his decision.

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The site of the hospital was acquired by the corporation under the Stafford Corporation Act, 1880. From the date of its acquisition until 1907 the site remained vacant, but in that year the corporation erected upon it and, until the agreement hereinafter mentioned, maintained there an isolation hospital. On December 22, 1938, there was passed the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938. This Act formed a number of constituent districts (which included the borough of Stafford) into a united district called the Mid-Staffordshire Joint Hospital District for the purpose of the provision of hospital accommodation for persons in the constituent districts who were suffering from infectious diseases other than smallpox, and set up a Joint Board which was to be known as the Mid-Staffordshire Joint Hospital Board (hereinafter referred to as "the Board"). After the passing of that Act the corporation were precluded (by reason of section 7 of the Public Health Act, 1936) from discharging in their district any functions of the Board, but by virtue of paragraph 22 of the schedule to the Act they were, in effect, authorized to continue the Tithe Barn Hospital until a hospital provided by the Board was ready for the reception of patients. The corporation acted in pursuance of this authority until 1943, when they were requested by the Board to lease the hospital to them. Accordingly, by an agreement dated May 27, 1943, the corporation demised to the Board the land in Tithe Barn Road together with the isolation hospital and ancillary buildings erected thereon and the fixtures and fittings therein mentioned for the term of 10 years from October 1, 1941, at the yearly rent of £320. The Board covenanted (inter alia) to maintain and use the hospital as an isolation hospital for the reception of persons suffering from infectious diseases other than smallpox. The agreement gave the Board an option of leasing the hospital for a further 10 years at the expiration of the demised term.

From the date of the said agreement until July 5, 1948, the Board maintained and used the property as an isolation hospital as provided by the agreement. It is not disputed that on that day the property vested in the Board (who were a local authority within the definition of that expression contained in section 79 (1) of the National Health Service Act, 1946), became vested in the Minister of Health for the residue of the term granted by the said agreement. The question is, as already stated, whether the freehold reversion in the property also vested, and this turns on certain

provisions of the Act of 1946, to which it will now be convenient to refer.

Section 1 (1) and (2) read as follows: “ (1) It shall be the duty of the Minister of Health (hereinafter in this Act referred to as ‘ the Minister ’) to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for the purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act. (2) The services so provided shall be free of charge, except where any provision of this Act expressly provides for the making and recovery of charges.”

Section 6 (1) (2) and (4): “ Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section. (2) Subject to the provisions of this Act, there shall also, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all hospitals vested in a local authority immediately before the appointed day, and all property and liabilities held by a local authority, or to which a local authority were subject, immediately before the appointed day, being property and liabilities held or incurred solely for the purposes of those hospitals or any of them or for the purpose of securing accommodation for persons in the area at any hospital not vested in the authority. . . . (4) All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day, and the Minister may use any such property

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“ for the purpose of any of his functions under this Act, but shall
 “ so far as practicable secure that the objects for which any such
 “ property was used immediately before the appointed day are
 “ not prejudiced by the provisions of this section.”

Section 79 (1): “ ‘ hospital ’ means any institution for the
 “ reception and treatment of persons suffering from illness or
 “ mental defectiveness, any maternity home, and any institution
 “ for the reception and treatment of persons during convalescence
 “ or persons requiring medical rehabilitation, and includes clinics,
 “ dispensaries and out-patient departments maintained in con-
 “ nection with any such institution or home as aforesaid, and
 “ ‘ hospital accommodation ’ shall be construed accordingly; . . .
 “ ‘ property ’ includes rights . . . ‘ voluntary ’ means not carried
 “ on for profit and not provided by a local or public authority.”

Then section 9 (1) (2) (3) and (4): “ (1) For the purposes of
 “ the foregoing provisions of this Part of this Act relating to the
 “ transfer of property and liabilities, the expression ‘ hospital ’
 “ includes, in addition to the premises specified in the definition
 “ of the said expression contained in section seventy-nine of this
 “ Act, any clinic, dispensary or out-patient department not main-
 “ tained in connection with such premises as aforesaid at which
 “ treatment by or under the direction of medical or dental
 “ practitioners is provided, not being—(a) a clinic or out-patient
 “ department maintained by a local education authority or main-
 “ tained by any other local authority for the care of expectant and
 “ nursing mothers and young children; or (b) a clinic, out-patient
 “ department or dispensary where medical advice or treatment is
 “ ordinarily given by general medical practitioners and not by
 “ specialists; and also includes any part of a workhouse within
 “ the meaning of the Poor Law Act, 1930, which would, if it
 “ were a separate institution, be a hospital as defined by the said
 “ section seventy-nine, but save as aforesaid does not include
 “ any premises forming part of or ancillary to any institution or
 “ undertaking of which the main purpose is not therapeutic.
 “ (2) Where in connection with a voluntary hospital any premises
 “ are used for providing accommodation for paying patients and
 “ any profits thereby earned are made available for the benefit
 “ of the hospital, the premises shall be deemed for the purposes
 “ of this Part of this Act to form part of the hospital. (3) Where
 “ —(a) any premises are intended to be used for the purposes of
 “ a hospital to which section six of this Act applies but have not
 “ been so used before the appointed day, and work has been done

“ before that day for the purpose of adapting the premises for
 “ such use; (b) it is intended to construct on any land new
 “ buildings or works which will on completion be used for the
 “ purposes of such a hospital as aforesaid, and the work of
 “ constructing the buildings or works has commenced before the
 “ appointed day; (c) any premises used for the purposes of such
 “ a hospital as aforesaid have been destroyed and have not been
 “ restored before the appointed day; or (d) any premises normally
 “ used for the purposes of such a hospital as aforesaid are, owing
 “ to damage or any other cause, not so used immediately before
 “ the appointed day; any interests in those premises or in that
 “ land or, in the case of destroyed premises, the site thereof held
 “ immediately before the appointed day by the governing body
 “ of the hospital or trustees or, as the case may be, the local
 “ authority in whom the hospital is vested, being interests held
 “ solely for the purposes of the hospital, shall be deemed for the
 “ purposes of this Part of this Act to be interests in premises
 “ forming part of the hospital. (4) Where any premises or land
 “ normally used for other purposes are or is temporarily used
 “ immediately before the appointed day by a local authority for
 “ the purposes of a hospital, the premises or land shall not be
 “ deemed for the purposes of this Part of this Act to be a hospital
 “ or, as the case may be, to form part of a hospital.”

As the Tithe Barn Hospital was not a “ voluntary ” hospital it vested in the Minister by virtue of subsection (2) of section 6 of the Act and not by virtue of subsection (1), and the argument for the Minister is, in brief, that the words in subsection (2) “ all “ hospitals vested in a local authority ” are sufficient to include not only the term of years which was granted by the corporation to the Board (a local authority) but also the freehold reversion which was vested in the corporation (another local authority). In the course of his judgment Danckwerts J., after referring to section 6 (2), said: “ The first thing which strikes one on reading “ that subsection after having also read subsection (1) is that, “ whereas subsection (1) refers to ‘ interests in or attaching to “ ‘ premises,’ which suggests that the quality of ownership was “ evidently before the mind of the draftsman when he was dealing “ with voluntary hospitals, when one comes to subsection (2) one “ finds no reference to interests at all, but a reference to ‘ all “ ‘ hospitals vested in a local authority.’ It would appear that “ the draftsman of the Act, when he dealt with hospitals belong- “ ing to a local authority, if I may use that term, had in mind

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“ simply the corporeal existence of the hospital as a building or
“ an activity which was conducted by or on behalf of the local
“ authority, and it does not appear to have occurred to him that
“ the hospital might not be vested in the local authority so far
“ as all interests in land were concerned otherwise than for all
“ time in fee simple. It does not appear to have occurred to him
“ that a local authority might be carrying on a hospital on land
“ in which it had only a very limited interest, such as a short
“ term of years. It appears to have been assumed that nobody
“ other than the local authority would be interested in the land
“ on which the hospital stood, and so, if a certain construction
“ were put on the subsection, it might result in the appropriation
“ of a citizen’s property entirely without compensation. If I
“ look at a hospital merely as a building or activity carried on
“ by a local authority immediately before the appointed day, I
“ might find that there was a short leasehold interest vested in
“ the local authority and that, subject to that, the site of the
“ hospital belonged in fee simple to some private person. If I
“ then construe the subsection as simply vesting the hospital
“ without further consideration in the Minister without regard to
“ the interests of other persons in the land concerned, it would
“ appear that the subsection would have the effect of depriving
“ a private person of his fee simple without any provision for
“ compensation.”

The judge said that he could not believe that that was the intention of the subsection, and expressed the view that what must be vested in the Minister must be a hospital, meaning the site and activities to the extent to which the site or the interests in the site were vested in a local authority. Then, after considering the respective positions in the matter of the Joint Hospital Board and the corporation, he said: “ It is a matter which
“ appears to me to be of considerable difficulty. I have taken
“ one step, which is to limit the interests transferred by this
“ subsection to interests in the land vested in a local authority,
“ and the question is whether I ought to impose a further limitation on the construction of this subsection. It seems to me
“ that I must apply the subsection according to the words which
“ are used, and that, if there is any interest in land which is used
“ for the purposes of a hospital immediately before the appointed
“ day, I must regard this subsection as transferring to the Minister
“ the interests in that land which are vested in any local authority. Therefore, while in some respects the result is rather

"surprising, I come to the conclusion, invoking the Interpretation Act, that the provisions of this subsection may apply to two or more local authorities as well as to one. Consequently, it seems to me that, this being land on which the activities of a hospital were carried on immediately before the appointed day, whatever interests in that land were vested in a local authority are transferred by this subsection to the Minister of Health, and that not only the leasehold term, which was held by the Mid-Staffordshire Joint Board, but also the fee simple interest, which was owned by the Stafford Corporation, were vested in the Minister by the provisions of section 6 (2) of the Act of 1946."

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It will be seen that the judge in effect implied into the earlier part of subsection (2) the reference to interests in or attaching to premises which appears in subsection (1), but confined such interests to those which belonged to a local authority. If this implication is warranted it has the result of vesting the sites and structures of "local authority" hospitals in the Minister by virtue of the words "all hospitals" in subsection (2) without recourse to the later part of the subsection which relates to the vesting of "property." If, however, the implication is unjustified the Minister could not, and does not, contend that the freehold reversion now in question vested in him under the provision relating to "property"; for, although the reversion was undoubtedly property held by a local authority, it was certainly not held "solely for the purposes of the hospital," and it is only property so held that vests by virtue of that provision.

I will consider first, then, the question as to the meaning of the phrase "all hospitals" in the earlier part of section 6 (2). Does it mean or include physical property, or is it only referring to hospital activities as distinct from the buildings and premises in which such activities were, immediately before the appointed day, being carried on? Inasmuch as the second part of the subsection deals specifically with "all property . . . held by a local authority . . . immediately before the appointed day, being property . . . held . . . solely for the purposes of those hospitals," it would seem at first sight that the phrase "all hospitals" in the first part of the subsection was referable to activities and not to physical premises. This prima facie impression gains some support from the fact that in subsection (1) (in contrast to subsection (2)) the words "premises . . . used for the purposes of a voluntary hospital" are expressly used, and, further, that such words themselves indicate a distinction between

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property on the one hand and the purposes of an enterprise on the other; see also subsection (4), where that which is to vest in the Minister free of any trust is "property" and not "hospitals." As against this there is in subsection (1) (but not in subsection (2)) a reference to "premises forming part of a "voluntary hospital." Notwithstanding, however, the impression which, as I have said, derives at first sight from subsection (2), it was contended before us by counsel for the Ministry that a reference to the definition of "hospital" in section 79 of the Act, and to some of the provisions of section 9, leads to a different result. It seems to me, however, that the language of the definition in section 79 is referable rather to a variety of objects or purposes than to land or buildings; in any event it cannot be regarded as solely referable to the latter. Then section 9 (1) refers to the subject matter of the definition of "hospital" in section 79 as "premises" and makes certain additions to them. The rest of the subsection, however, seems to indicate that the word "premises" itself is being used in a sense indicative rather of activities or of an undertaking than of property, and therefore does not carry the matter much further. Subsection (2) provides that "where in connection with a voluntary hospital any premises "are used for providing accommodation for paying patients and "any profits thereby earned are made available for the benefit "of the hospital, the premises shall be deemed for the purposes "of this Part of this Act to form part of the hospital." Here the word "hospital" in relation to the availability of profits means, apparently, the "enterprise" and in relation to premises includes, it would seem, both enterprise and property. Subsection (3) distinguishes clearly between premises, land and buildings on the one hand, and "hospital" in the sense of activity or enterprise on the other. Finally, subsection (4) of section 9 again draws a distinction between a hospital in the sense of an enterprise and the land upon which that enterprise is carried on. There are other references also to be found in the Act to premises and property and hospitals, but, in my judgment, neither they nor those which I have mentioned disturb what I regard as the natural meaning and effect of section 6 (2), namely, that they vest in the Minister, first, all hospital activities (including management and control) which were formerly vested in local authorities; and, secondly, all property and rights which had been held by such authorities solely for the purpose of those activities.

It is, however, not necessary to express a concluded view on this question for, even assuming that the words "all hospitals" "vested in a local authority" in section 6 (2) include legal and equitable interests in the land and premises on and in which the activities of the hospitals were conducted, I am clearly of opinion that the reversionary interest of the Stafford Corporation in the Tithe Barn Hospital was not within their scope. In my judgment, the word "vested" as used in section 6 (2), indicates the ownership of a proprietary interest as part of the hospital undertaking. Certain interests which, before the appointed day, belonged to a local authority which was carrying on a hospital and providing hospital services were to pass into the ownership and possession of the Minister. It is with those interests, and those alone, that the subsection was concerned. Such a result is not only strictly and fully in accordance with the language used, but is in conformity with the heading to section 6, which is "Transfer of Hospitals to the Minister." The language does not appear to me to be at all appropriate to include a reversionary interest belonging to a local authority which was not itself carrying on a hospital or providing hospital services; and I can see no sufficient warrant for attributing a strained interpretation to the language of subsection (2) merely for the purpose of achieving a degree of compulsory and uncompensated confiscation which is unnecessary on the one hand, and productive of uncertainty and confusion on the other. The validity of the Minister's contention that the corporation's reversionary interest in the hospital became vested in him was, during the argument, tested by applying two different hypotheses. The first was the assumption that the corporation had leased the premises in question for the purposes of a voluntary hospital, and that they were being used as such immediately prior to July 5, 1948. If such had been the position, it is clear that the term granted to the lessees would have vested in the Minister under section 6 (1) as it is that the corporation's reversionary interest would not. Nevertheless, if the Minister's argument on section 6 (2) be right, the reversion would have vested in him thereunder so that the vesting provisions of that subsection would have the incidental effect of enlarging those of subsection (1). The Attorney-General was not disposed to accept this as reflecting the probabilities of the matter and sought to meet the difficulty by suggesting that subsections (1) and (2) should be treated as wholly isolated from one another and that effect should be given to each without any regard to the other.

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This treatment of two consecutive subsections in an Act of Parliament is one only to be resorted to in case of necessity. No such necessity is to be found here and, further, subsection (3) of section 9, to which I have already referred, operates indifferently on all hospitals affected by section 6, both those which are dealt with by subsection (1) and those which are the subject of subsection (2). It seems to me, accordingly, that the Minister's contention does not successfully survive the first of the tests which were suggested in argument; nor did it fare any better when subjected to the second. This took the form of an inquiry as to what the position would be if the Stafford Corporation had granted a lease of the premises in question to A (a private individual), who had then sublet to the Board, and the Board were using the premises as a hospital under that sublease immediately before the appointed day. Would the Minister, in those circumstances, claim that the corporation's freehold reversion vested in him under section 6 (2) notwithstanding that the leasehold reversion which was vested in A did not? The Attorney-General was inclined to think that the freehold reversion would not vest, but Mr. Buckley thought that it would. I do not myself see how, consistently with the interpretation of section 6 (2), which the Minister contends is the right one, he could do other than accept Mr. Buckley's view on this point as correct; and yet it is difficult to suppose that the legislature could have contemplated as a practicable proposition that the Minister should enter into possession of a hospital for a term of years, then relinquish possession for what might be another period of years and then re-enter for an estate in fee. No such difficulties as these would or could arise if one is content to accept the language of section 6 (2) as one finds it, and to confine its operation to the vesting in the Minister of what a local authority which was providing a hospital service was capable of transferring, namely, such legal interest in the premises of the hospital as it had.

As an alternative way of presenting the Minister's case it was suggested that certain of the provisions of the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938, demonstrate that the defendant corporation still retained a sufficiently active part in the management of the hospital in question as to justify the view that in some sense the hospital was vested in them. It was pointed out that the corporation contribute four out of the 27 members who constitute the Board; that by paragraph 11 of the Schedule to the Act the

corporation are empowered to make orders for the admission of persons to the hospital; and that by paragraphs 13 and 15 they have to contribute financially to the common fund of the Board. These features of the Act, however, are common to all the constituent districts which constitute the Mid-Staffordshire Joint Hospital District, and in my opinion they have no appreciable relevance to the question whether the corporation's reversionary interest which is in issue in these proceedings became vested in the Minister by virtue of the Act of 1946.

I have already indicated that in my opinion it did not. It is to be borne in mind that the provisions of section 6 of this Act are of a confiscatory character, and the courts are not disposed to hold that a man—or, as here, a local authority—is dispossessed of his property without compensation in the absence of language which clearly leads to that conclusion. In my judgment, for the reasons which I have endeavoured to express, the language of section 6 (2) does not lead to that conclusion in relation to the reversionary interest of the defendant corporation; it leads, on the contrary, to the conclusion that the corporation's ownership of that interest remained altogether unaffected by the Act. In my opinion, accordingly, this appeal should be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co., for T. Broughton Nowell, Stafford; Solicitor of Ministry of Health.*

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[1951 G. No. 2676.]

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July 28.

Evershed M.R.,
Morris and
Romer L.JJ.

Will — Condition subsequent — Beneficiaries required to “take up “permanent residence in England . . .”—Divesting “in default “of continuance of compliance with this condition”—Validity.

A testatrix settled her residuary estate on a number of persons in succession, subject to the following condition subsequent contained in clause 10 of her will: “Provided . . . that every “person who . . . shall become entitled in possession to my “residuary estate . . . shall within six months from the date of “becoming so entitled take up permanent residence in England “and in default of continuance of compliance with this condition

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"or in case of subsequent discontinuance of compliance with this condition the trusts hereinbefore declared in favour of such person and his issue shall determine and become void. . ."

Roxburgh J. held that clause 10 embodied a concept of sufficient certainty and that it was therefore valid. On appeal:—

Held, that it is not essential for the validity of a condition subsequent that the words of the condition shall be of such a character that the question whether a forfeiture has or has not occurred, or would or would not be incurred, can be ascertained not only with certainty but with perfect ease. The language of clause 10 was sufficiently precise and definite to give it validity.

Sifton v. Sifton [1938] A.C. 656 distinguished. The observation of Lord Simonds L.C. in *Bromley v. Tryon* [1952] A.C. 265, 276 considered and applied.

Decision of Roxburgh J. ante 418 affirmed.

APPEAL from Roxburgh J.¹

By her will dated October 27, 1942, Mrs. Sibyl Marion Geraldine Gape, a widow, provided by clause 8 that her residuary estate should be held on trust for the first defendant, James Nugent Gape, for life, with remainder for his sons successively, according to their respective seniorities in tail, with remainder upon trust for the defendant Kenneth Henry Surtees Gape for life, with remainder in trust for his sons successively according to their respective seniorities in tail, with divers remainders over.

By clause 10 she directed: "Provided nevertheless that every person who under the trusts aforesaid (including the divesting limitations in this clause contained) shall become entitled in possession to my residuary estate as tenant for life or in tail male or in tail shall within six months from the date of becoming so entitled take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with this condition the trusts hereinbefore declared in favour of such person and his issue shall determine and become void as if such person were then dead and if tenant in tail male or tenant in tail there was a general failure of his or her issue, and in such case the residuary estate shall be held" on certain trusts there set out.

The testatrix died on December 30, 1950.

The first defendant, James Nugent Gape, lived in the U.S.A. together with his two sons and his daughter, and the defendant Kenneth Henry Surtees Gape and his three children also lived there.

¹ Ante, 418.

The trustees of the will took out the present summons for the determination of the question whether the condition contained in clause 10 was valid.

Roxburgh J. held that clause 10 was valid.

The first defendant, J. N. Gape, and his three children appealed.

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Montgomery White Q.C. and *Hunter Brown* for the first defendant, J. N. Gape, and his three children. It is submitted that the condition in clause 10, which it is agreed is a condition subsequent, is too uncertain to be enforceable. This case is covered by the decision of the House of Lords in *Sifton v. Sifton*.² The only difference between that case and this is that the testatrix in clause 10 requires that the residence shall be "permanent." The addition of the word "permanent" adds nothing to the condition. For a condition subsequent to be enforceable the trustees must be able to know when the condition is broken. The authorities establish that a condition of forfeiture must be clear: *Clavering v. Ellison*.³ It must be possible to say at what exact moment a forfeiture occurs. Whether in fact a forfeiture occurs here will depend on the state of mind of the beneficiary. The trustees of the will cannot know when a beneficiary's residence here has ceased to be "permanent." [They referred to *Clayton v. Ramsden*⁴; *In re Bouverie*.⁵]

The tendency of the recent authorities is to construe conditions of forfeiture strictly. The courts do not favour attempts of a testator to control the lives of beneficiaries from the grave.

This is a condition subsequent, and the decisions on domicile, such as *Udny v. Udny*,⁶ are of no assistance. Domicile depends on intention. Clause 10 is directed to a state of facts. It is not possible to know what constitutes "permanent residence" for the purposes of the clause. Roxburgh J. was wrong in holding that this case was not covered by *Sifton v. Sifton*.⁷

Neville Gray Q.C. and *T. A. C. Burgess* for persons interested in remainder on the determination of the interests of the first defendant and his children were not called on to argue. [They referred to *Bromley v. Tryon*.⁸]

Peter Foster for the plaintiffs.

² [1938] A.C. 656.

³ (1859) 7 H.L.C. 707.

⁴ [1943] A.C. 320.

⁵ Ante, 400.

⁶ (1869) L.R. 1 Sc. & D. 441.

⁷ [1938] A.C. 656.

⁸ [1952] A.C. 265.

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EVERSHED M.R. stated the facts and continued:—The question is whether the effect of clause 10 of the will of the testatrix, which, for the purposes of the argument both in this court and in the court below, has been treated (and I doubt not rightly treated) as a condition subsequent, is liable to defeat the interest of the first defendant or his issue, or whether, according to the well-established principles, it is of so uncertain a character as to be wholly ineffective.

To clear out of the way one small matter of fact, or of fact and law, it appears that the first defendant at the moment, and also his two sons, are resident in Ohio in the United States of America, and have been so resident at all material times. If, therefore, the condition is effective, it would be necessary for the first defendant within six months “from the date of becoming “so entitled” as tenant for life to “take up permanent residence “in England.” Roxburgh J., in his judgment, stated that the first defendant is in America and is “flouting” the intentions of the testatrix. Mr. Montgomery White has criticized that observation. He observes that at the moment the residue has not been certainly ascertained; therefore, that the six months have not begun to run. He says that the words “becoming so “entitled” can only relate to the time when the residue has been ascertained. Upon that matter I express no opinion, because it has not been argued. I will, however, assume in Mr. Montgomery White’s favour first that there is no real justification for saying that the first defendant is “flouting” the intentions of the testatrix or of anybody else, and, secondly, that the period for his election has not expired, whether or not it has begun to run. Indeed, in fairness to the first defendant, it is right to say that he desires to find out what is the effect of the will and then in due course to consider what steps he will take if he desires to take the benefits under it, and whether or not he will take any such benefits. But that is by the way. The question is whether this defeasance clause—this condition subsequent—has so great a quality of uncertainty as to render it invalid.

I observe that the condition relates to residence and not, for example, to the first defendant’s marriage or to his religion. It is well established that the courts are always adverse to conditions which may affect a free choice in matters relating to a marriage or in matters relating to conscience. These considerations of public policy have obviously no application in the present case.

I assume, however—and I think it is right to assume—that the test in all conditions subsequent of this character is the same, whether the condition relates to such a matter as religion or to such a matter as residence. It has been so stated (and must now be taken to have been authoritatively stated) in the decision of the Privy Council delivered by Lord Romer in the case of *Sifton v. Sifton*⁹ in 1938. The particular passage most frequently quoted, and cited by Roxburgh J. in the court below, is that where Lord Romer said¹⁰: “If the clause in question be in truth “a condition subsequent—a point with which their Lordships “will deal later on—it can be of no validity unless, to use the “words of Lord Cranworth”—and that is a reference to the case of *Clavering v. Ellison*¹¹—“the court and, their Lordships “venture to add, the parties concerned, can see from the beginning precisely and distinctly upon the happening of what “events it is that the payments to the appellant are to cease.” In that case the condition in question was this: the payment of income to the appellant “shall be made only so long as she shall “continue to reside in Canada.” It was observed by Lord Romer, after referring to certain specific questions which had been formulated in the Court of Appeal in Ontario, that that formula “so long as she shall continue to reside in Canada” was of so loose and imprecise a character as necessarily to make it impossible to answer a number of obvious questions. The words “to reside in,” in ordinary contexts, might, with equal correctness, be intended to mean actually to live in—to be physically there; or they might mean no more than to maintain a house in. As Lord Romer observed, neither of those extreme views could have possibly been the intention of the testatrix. So that the court found itself faced with a phrase to which it was, as he said, impossible to attach a certain or precise significance. It will be noticed that, in the present case, the formula is different, for there is attached to the noun “residence” the very important adjective “permanent”; and it is, in my view, that adjective—that quality of permanence which it imports—which when attached to “residence” distinguishes this case from cases like *Sifton v. Sifton*,¹² and makes it not only possible but right to say that in this case the phrase used and the event contemplated is one which can be precisely and distinctly ascertained.

I venture to draw attention to other cases referred to by Lord Romer earlier in the report of *Sifton v. Sifton*¹²; for example,

⁹ [1938] A.C. 656.

¹⁰ Ibid. 675.

¹¹ 7 H.L.C. 707.

¹² [1938] A.C. 656.

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C. A. *In re Sandbrook*¹³ and *In re Viscount Exmouth*.¹⁴ In the former case Parker J. said that in the case of conditions subsequent¹⁵ "in order to cause . . . a forfeiture, must be such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur." Fry J., in the latter case, used the more general phrase¹⁶: "It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect." It is quite clear to me that Lord Romer, in his phrase¹⁷ "can see from the beginning precisely and distinctly upon the happening of what events," etc., was but restating in his own language the same principle which Parker J. and Fry J. had stated; in other words, it is not necessary that the words of the condition should be of such a character that the question whether forfeiture has or has not occurred or would or would not be incurred can be ascertained not only with certainty but with perfect ease. Sometimes, no doubt, it is a matter of some difficulty to say whether, having regard to the particular events which have happened (and, as all the world knows, sometimes the actual events are of a most unusual and unforeseen character) the forfeiture has, according to the true construction of the document, been incurred. But that aspect of the matter is not essential to the validity of the condition, as is illustrated by *Bromley v. Tryon*,¹⁸ a decision of the House of Lords. That was a case of a shifting clause under a will whereby certain settled estates became divested upon the happening of certain rather complex events. In reference to that provision Lord Simonds L.C. said¹⁹: "It does not follow because the words of a defeasance clause are sufficiently clear to give the clause validity that there may not be cases in which its application is difficult, and I apprehend that, if there is a real doubt, the court will show the same favour to a vested estate in applying the clause as it does in construing it." But the question in the present case is not whether certain events might happen which might or might not make it difficult to say whether the event contemplated had occurred, but whether the language used is sufficiently precise and definite to give it validity; and, as I have already indicated, I think it is.

I agree, therefore, with the conclusion which Roxburgh J. reached, and with the reasoning which led him to that conclusion.

¹³ [1912] 2 Ch. 471.

¹⁴ (1883) 23 Ch.D. 158.

¹⁵ [1912] 2 Ch. 471, 477.

¹⁶ 23 Ch.D. 158, 164.

¹⁷ [1938] A.C. 656, 675.

¹⁸ [1952] A.C. 265.

¹⁹ Ibid. 276.

Mr. Montgomery White and Mr. Hunter-Brown will not, I hope, think that I am unappreciative of their arguments if I do not expand at great length the decision which I have indicated. Suffice it to say that the word "permanent" seems to me here to make all the difference, for the notion or "concept," as Roxburgh J. said, of "taking up" and, thereafter, maintaining, in a particular country your permanent residence, is, I should have thought, one perfectly well understood and sufficiently precise. As has been observed during the course of the argument, the intention permanently to reside in a particular country is one of the two essential characteristics of domicile. It has been emphasized as an essential condition or characteristic time and again in these courts, and I find it impossible to suppose that the judges, in referring to that characteristic, were doing other than stating something which was to the lawyer both definite and precise. If a synonym be required, I would say that the condition of taking up permanent residence in England was another way of saying: making England your permanent home; that is to say, residing in England with the intention of continuing to reside there until you die. It is, in other words, another way of referring to the characteristic essential to domicile. If that be the meaning, such a question as "Do you cease to reside in England if you spend 11 months of the year on the "Continent?"", though it may be, in vacuo, a difficult question to answer, is in this context irrelevant. It is no doubt true that *prima facie* the testatrix was thinking in terms of fact, whether certain events had in fact occurred; but the state of a man's mind, as has been said many times, is as much a question of fact as the state of a man's digestion, and the use of the word "permanent" inevitably, I think, imports into the formula the notion of the intention of the person concerned. You cannot take up a permanent residence at any particular point of time, unless at the time you take up residence you intend that it should be permanent, that is, that you should go on living there for your natural days. Though no doubt to ascertain the state of a man's mind is a question which may involve difficulties, as I have already indicated by reference to the speech of Lord Simonds L.C. in *Bromley v. Tryon*,²⁰ that difficulty of ascertainment is not by any means fatal to a clause of this kind.

Without, therefore, saying more—because it is, as I think, a short point—I am of opinion that this phrase "take up

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²⁰ [1952] A.C. 265.

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“permanent residence” has a sufficient quality of precision and distinctness to give it validity. I therefore think that the learned judge rightly concluded this case, and that the appeal should be dismissed.

MORRIS L.J. I am entirely of the same opinion. In the case of *Fillingham v. Bromley*²¹ Lord Eldon said: “There is great difficulty in saying that a forfeiture was incurred, when the court cannot see clearly what it was the testator meant.” In the later case of *Clavering v. Ellison*²² Lord Cranworth expressed the same view when, in dealing with the situation where a vested estate was to be defeated by a condition on a contingency that was to happen afterwards, he said²³: “That condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.” The fact that there may be difficulty in ascertaining whether an event has happened does not necessarily denote that the event has not been distinctly defined. That was pointed out by Jenkins J. in the case of *In re Coxen*,²⁴ when he said: “There is, therefore, nothing in *Sifton v. Sifton*²⁵ which precludes me from holding the condition here in question to be a valid condition, provided I am able to attach a sufficiently definite meaning to it in the context afforded by the codicil, and”—and he refers to two cases—“in deciding whether I am able to do so or not I must keep in mind the distinction between uncertainty as to the events prescribed by the testator as those in which the condition is to operate (which is, generally speaking, fatal to the validity of such a condition) and difficulty in ascertaining whether those events (sufficiently prescribed by the testator as a matter of definition) have happened or not, which is not necessarily fatal to such validity.”

I am also of the opinion that the phrase now in question—the phrase “take up permanent residence in England”—does embody a conception which is clear and precise.

I agree with all that my Lord has said, and I think this appeal fails.

ROMER L.J. I also agree. I agree with what the Master of the Rolls has said as to the word “permanent” being the

²¹ (1823) Turn. & Russ. 530, 536.

²² 7 H.L.C. 707.

²³ *Ibid.* 725.

²⁴ [1948] Ch. 747, 760.

²⁵ [1938] A.C. 656.

decisive word, and the word which entirely removes the case from the area of *Sifton v. Sifton*.²⁵ The phrase "to take up permanent residence" immediately calls to one's mind the domicile cases. Lord Halsbury L.C., in the case of *Winans v. Attorney-General*,²⁶ said: "Where a domicile of origin is proved it lies upon the person who asserts a change of domicile to establish it, and it is necessary to prove that the person who is alleged to have changed his domicile had a fixed and determined purpose to make the place of his new domicile his permanent home. Although many varieties of expression have been used, I believe the idea of domicile may be quite adequately expressed by the phrase 'Was the place intended to be the permanent home?'" Lord Lindley, in the same case, said²⁷: "I take it to be clearly settled that no person who is sui juris can change his domicile without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicile is an intention to adopt the second residence as home, or, in other words, an intention to remain without any intention of further change except possibly for some temporary purpose." So closely associated is that language with the language of this forfeiture clause, that I asked Mr. Montgomery White, in the course of the argument, what the position would be in regard to a condition that, if a beneficiary had a foreign domicile, he should within six months acquire and thereafter retain an English domicile of choice, and that if the beneficiary already had an English domicile, he should thereafter retain it and forfeit the bequest if he at any time acquired a foreign domicile of choice. What would be the position if that had been the condition in the present case (as in my view it substantially is)? He conceded that he could not say that such a condition would be void for uncertainty, notwithstanding that it involved an inquiry into the acquisition or retention of a permanent residence. But he said that while not being able to contend that it would be void for uncertainty, it could not apply here, because such a condition would postulate the question of intention, and the testatrix here was not bothering about intention but about fact. As to that I quite agree with what my Lord has said. The expression "take up" suggests volition and

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²⁵ [1938] A.C. 656.²⁷ Ibid. 299.²⁶ [1904] A.C. 287, 288.

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intention and even more so does the word "permanent," for it postulates a decision to live in a place for the rest of one's life, as opposed to living there temporarily or for a fixed period of time and no longer. As I see it, therefore, the suggested distinction is untenable. The test which is applied in relation to domicile is a perfectly ascertainable test and is relevant to the present case, and for this and the other reasons which my Lord has given this appeal must fail.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*

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In re LAMBTON'S MARRIAGE SETTLEMENT.
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[1951 L. 1976.]

Revenue — Estate duty — Settlement — Property passing on death — Passing not by reason only of failure of interest of deceased — Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 5 (3) — Finance Act, 1938 (1 & 2 Geo. 6, c. 46), s. 48.

By a marriage settlement made shortly before the marriage the husband transferred funds to trustees on trust to pay during the joint lives of himself and his wife an annuity of £400 to the wife and the rest of the income to himself. In the event which happened of his predeceasing her the income of the settled fund became payable to her during her life or until she remarried. The Commissioners of Inland Revenue declared that on the death of the husband estate duty was payable on the whole fund but the trustees claimed that estate duty was payable only on the fund less the amount attributable to the wife's annuity.

Held, that estate duty was payable under the Finance Act, 1894, s. 1, on the whole fund at the death of the husband and that the decision in *Att.-Gen. v. Glossop* [1907] 1 K.B. 163 to the contrary could no longer be treated as binding, seeing that the distinction which the Court of Appeal had there drawn between the circumstances in that case and those in *Cowley v. Inland Revenue Commissioners* [1899] A.C. 198 had been invalidated by the later decision of the House of Lords in *de Trafford v. Att.-Gen.* [1935] A.C. 280.

It was in the circumstances unnecessary to express a final view on the question whether the decision in *Att.-Gen. v. Glossop*, *supra*, which had been based on section 5 (3) of the Finance Act, 1894,

had subsequently been rendered inapplicable by the amendment to that subsection made by the Finance Act, 1938, s. 48.

Decision of Harman J. [1952] W.N. 47 affirmed.

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APPEAL from Harman J.

By a settlement dated July 20, 1912, made on the marriage of Charles Lambton and Miss M. L. Garforth, the husband transferred certain funds to trustees in trust for the parties to the marriage and their children.

Clause 2 provided that the trust fund was to be held in trust during the joint lives of the husband and wife "to pay out of the "income of the trust fund to the wife the yearly sum of £400 by "equal quarterly payments . . . and to pay the rest of such "income to the husband." By clause 3 it was provided that on the death of either of them the income of the settled fund was to be paid, if the husband survived the wife, to him for life, or, if the wife should survive the husband, to her for life or until she should marry. There was an ultimate gift over to the children of the marriage.

The husband died on December 5, 1949, leaving the wife and two children of the marriage, both of full age.

A summons was taken out by the trustees to have it decided what estate duty was payable on the death of the husband. Harman J. held that the duty was payable on the whole of the settled fund and not merely on the fund less the amount attributable to the wife's annuity. The trustees appealed.

Sir Lynn Ungood-Thomas Q.C. and *J. A. Armstrong* for the trustees. Our first submission is that estate duty became payable on the husband's death on the settled property after deduction of the slice required to pay the wife's annuity of £400 under section 1 of the Finance Act, 1894. The slice required to produce the £400 annuity in which the husband had an interest in the event of his surviving his wife would be chargeable under section 2 (1) (b), and since his interest determined before it came into possession section 5 (3)¹ applies and such slice is exempted from duty. It is submitted that *Attorney-General v. Glossop*² covers this case. That was not an annuity case. It was the case of a slice of income of a specified amount being given. There is a distinction

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¹ Finance Act, 1894, s. 5 (3):
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"when the interest of any person
"under the settlement fails or deter-
"mines by reason of his death before
"it becomes an interest in possession,

"and subsequent limitations under
"the settlement continue to subsist,
"the property shall not be deemed to
"pass on his death."

² [1907] 1 K.B. 163.

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between *Attorney-General v. Glossop*² and *Cowley v. Inland Revenue Commissioners*.³ Where an annuity is charged on the whole income of a trust, the annuity is something extraneous. Where there is a right to a part of the income, that is not a charge on the whole income, and on the death of the person entitled to the balance of the income the whole does not pass. [They referred to *de Trafford v. Attorney-General*.⁴]

On the death of the husband there was here no changing hands of the slice of capital required to produce the annuity. The decision in *In re the Duke of Norfolk*⁵ is of no assistance because that was the case of a continuing annuity. If the construction submitted of *Attorney-General v. Glossop*⁶ is wrong it is submitted that the court is not bound by that decision. [They referred to *Rex v. Northumberland Compensation Appeal Tribunal*⁷ and *Young v. Bristol Aeroplane Co. Ltd.*⁸]

J. A. Armstrong in the same interest. Our alternative submission is first that section 1 of the Finance Act, 1894, only applies to property which changes hands on the death as a whole, with the result that in the case of settled property section 1 requires a change in possession of the property as a whole and of the enjoyment of its income as a whole. In this case the wife received £400 a year out of the income before the husband's death and the whole after his death; there was therefore no change in the enjoyment of the income as a whole but only a partial change in the enjoyment of the whole income. There was no passing of the whole and accordingly section 1 did not apply. If there was no passing under section 1, then estate duty is payable under section 2 (1) (b) on the cesser of the husband's interest, with the result that section 7 (7) applies and estate duty is only payable on the share of the settled property the income of which was being paid to the husband at his death. [He referred to *Skinner v. Attorney-General*.⁹] Accordingly there was no reason given in *Attorney-General v. Glossop*¹⁰ for holding that the wife's property passed, and the fact that the husband had a contingent interest in the whole fund could not matter in view of the Finance Act, 1894, s. 5 (3). What enabled Harman J. to say that the Crown succeeded was not because *Glossop's* case¹⁰ was wrong but because the amendment to section 5 (3) in the Finance Act, 1938,

² [1907] 1 K.B. 163.

³ [1899] A.C. 198.

⁴ [1935] A.C. 280.

⁵ [1950] Ch. 467.

⁶ [1907] 1 K.B. 163.

⁷ [1951] 1 K.B. 721.

⁸ [1944] K.B. 718.

⁹ [1940] A.C. 350.

¹⁰ [1907] 1 K.B. 163.

s. 48, which provided that section 5 (3) should "have effect, in the case of a person dying after the passing of this Act, as if there had been inserted at the end thereof the words 'by reason only of the failure or determination of that interest,' " had rendered section 5 (3) inapplicable in the present case. It is, however, unnecessary for this court to depart from *Glossop's* case.¹⁰ That would be a matter for the House of Lords.

Pennycuik Q.C. and *J. H. Stamp* for the Crown. The court has always thought that if a deceased had an interest in settled property which failed to take effect, then it was not deemed to pass on the death under section 1 of the Act of 1894. This was the effect of section 5 (3) apart from the amendment in 1938. The estate duty office had always regarded this as wrong and this caused the addition to section 5 (3) to be made which resulted in duty being payable if the person dying had an interest before his death. Where we are not *ad idem* with the appellants is on the construction of the *Glossop* case,¹⁰ in view of *Cowley v. Inland Revenue Commissioners*,¹¹ and there was no change in *de Trafford v. Attorney-General*¹² where the *Cowley* case¹¹ was fully explained.

[*EVERSHED M.R.* In a case such as the present it seems unjust that the whole estate should be treated as passing on the death of her husband.]

It does seem unjust and that was the basis of *Attorney-General v. Glossop*,¹³ but in the above cases in the House of Lords a different view was taken independently of the amendment of section 5 (3), which only came afterwards. *Glossop's* case¹³ seems so confusing because section 5 (3) was applied to a passing under section 1 as regards a slice. The case put against the Crown here is that upon the true construction of the Act of 1894 estate duty became payable on the trust fund less the amount providing the wife's annuity. That is a case of slicing, but it is contrary to what was said in *In re the Duke of Norfolk*.¹⁴ It is a wrong view that slicing should be done. Here the wife's annuity ceased in the true view on the husband's death and the income of the whole of the settled fund then went to the wife for life.

J. H. Stamp following on the same side. The decision in *Glossop's* case¹⁵ was treated by all the judges as turning on

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¹⁰ [1907] 1 K.B. 163.¹¹ [1899] A.C. 193.¹² [1935] A.C. 280.¹³ [1907] 1 K.B. 163.¹⁴ [1950] Ch. 467.¹⁵ [1906] 1 K.B. 284; [1907] 1 K.B. 163.

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section 5 (3). Independently of that subsection that case could have no bearing here and the effect of the amendment contained in the Act of 1938 is to make that case inapplicable here.

J. A. Armstrong in reply.

EVERSHED M.R. I agree with the order made in this case by Harman J., and I think, therefore, that the appeal should be dismissed.

[His Lordship stated the facts and continued:] The question raised by the summons relates to the estate duty payable in respect of the marriage settlement property, and the several interests therein, upon the death of Brigadier Lambton. The alternative views which have been presented are, first, that duty is payable on the whole value of the settled property upon the footing that the whole property passed under section 1 of the Finance Act, 1894, upon the death of the Brigadier. The other view, for which the appellants in this court have argued, rests upon the authority of a case known as *Attorney-General v. Glossop*,¹⁵ to which I shall hereafter make full reference, and is to the effect that duty is exigible only in respect of that part of the property representing the excess of the income of the trust funds over the £400 a year which, by clause 2 of the deed, was payable to the wife during the joint lives, and that no duty is payable in respect of that £400 per annum, or in respect of what is now sometimes called the "slice," or that portion of the trust funds which may be said to have produced or represented it.

It will be convenient here to state one or two figures. Immediately before the death of the Brigadier the income of the trust property amounted in all to approximately £627 per annum. The total value of the investments at his death was approximately £17,500, and the total value of that part of the property which produced the £400 a year was £11,169 approximately. From the figures it will be noticed that, if the appellants are right, the amount of duty exigible will be in respect of roughly one-third of the trust property instead of the whole of it.

The first thing is to construe the relevant terms of the settlement so far as it is necessary for the purposes of my judgment. According to the terms of clause 2, £400 a year was to be paid out of the income to the wife, and the trustees were then to pay "the rest of such income" to her husband. As a matter of construction, I have no doubt that the effect of that provision is the same as though the clause had read (as these clauses not

¹⁵ [1906] 1 K.B. 284; [1907] 1 K.B. 163.

uncommonly do) "subject to payment" of the £400 a year, the income is payable to the husband; in other words, the effect of the provision is to give the husband the right to the income of the trust funds "subject to" the payment thereof of £400 a year to the wife. It cannot, I think, be suggested that the husband's rights as regards income during the joint lives were in all circumstances limited to so much of the income as was in excess of £400 a year.

As I have indicated already, the substantial question in this case is whether *Glossop's* case¹⁵ should now be regarded as having been rightly decided by this court, or whether it is (right or wrong) binding upon this court. I shall therefore have to analyse that decision somewhat closely, and two decisions of the House of Lords, one preceding *Glossop's* case¹⁵ and one subsequent to it. At this stage, however, it will be convenient to state briefly the facts and the effect of the decision in *Glossop's* case.¹⁶

It was a case like the present in that it related to a marriage settlement whereby, during the joint lives of the spouses, the wife was entitled to £400 a year as a first payment out of the income. So far the parallel is indeed close, and it remains close in that, subject to that interest of the wife, the husband was entitled during the joint lives to the residue of the income. The settlement further provided that after the death of either spouse the survivor should thereafter, for the rest of his or her life, be entitled to the whole income of the settled property. There was, however, this complication, that in *Glossop's* case¹⁶ there were two separate funds or fortunes; part of the funds were contributed by or on behalf of the wife, and part by the husband, and each of the two funds or fortunes had to be regarded as contributing rateably to the provision of the first £400 per annum payable to the wife. Further, in that case there were in fact no issue of the marriage, and the ultimate remainders, after the deaths of the spouses, were different accordingly as regards the two funds; in the case of the husband's fund, the final limitation was in the circumstances absolutely to the husband, and in the case of the wife's fund the final limitation was to her personal representatives. I should further add that the problem that arose in *Glossop's* case¹⁶ (as it has arisen here) was what was the proper estate duty payable upon the death of the husband, he being the first spouse to die. But it is necessary to bear in mind that in *Glossop's* case¹⁶ no

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¹⁵ [1906] 1 K.B. 284; [1907] 1 K.B. 163.
¹⁶ [1907] 1 K.B. 163.

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question was ever raised in the case but that estate duty was payable upon the death of the husband in respect of the whole of the husband's fund; whether that concession was made having regard to the previous decision in *Cowley v. Inland Revenue Commissioners*¹⁷ does not, I think, matter; but it is the fact that no question was raised in the case in regard to the husband's fund, the whole contest being what was the estate duty exigible on the death of the husband in respect of the wife's fund.

As I must refer a good deal to *Glossop's* case,¹⁸ it will, I think, make for simplicity to assume that the wife's fund and the husband's fund were exactly equivalent in value or amount. That being so, I can proceed as though the relevant trusts in relation to the wife's fund were; immediately before the husband's death, out of income, first, £200 per annum payable to the wife; subject thereto, during the joint lives the husband was entitled to the whole income; and on the death of the husband the whole income of the wife's fund then went to the wife for the rest of her life, passing thereafter to her personal representatives. But, of course, if the husband had survived his wife, he then would have been entitled to the entire income of the wife's fund for the rest of his life. The decision of this court, in the circumstances I have mentioned, was that duty was payable in respect of the wife's fund to the extent that it was referable to the excess of the income of that fund over £200 a year, but that no duty was leviable in respect of that part of the fund which was attributable to the production of the £200 a year payable to the wife, that part (or the claim for duty in respect thereof) being exempted by the effect of section 5 (3) of the Finance Act, 1894.

It is clear that there are involved in this case two points; and though the arguments in regard to them are necessarily, to some extent, intertwined, they are distinct points. The first question is: Was the exemption which the Court of Appeal held in *Glossop's* case¹⁸ to be applicable to the claim for duty quoad the £200 a year removed by the amendment made to section 5 (3) of the Finance Act, 1894, by section 48 of the Finance Act, 1938? Secondly, and apart from that first question: Is the distinction which the Court of Appeal drew between the circumstances in the *Glossop* case¹⁸ and the circumstances in the *Cowley* case¹⁹ invalidated by the interpretation which has been given to the *Cowley* case¹⁹ by the later decision in the House of Lords of *de Trafford v. Attorney-General*?²⁰ so that upon the principle

¹⁷ [1899] A.C. 198.

¹⁸ [1907] 1 K.B. 163.

¹⁹ [1899] A.C. 198.

²⁰ [1935] A.C. 280.

stated in *Rex v. Northumberland Compensation Appeal Tribunal*²¹ this court should now regard the decision in *Glossop's case*²² as no longer correct and binding upon us?

I propose to deal with those two questions in the order in which I have stated them; but I shall first, I hope, be forgiven if I read such part of the relevant sections of the Finance Act, 1894 (familiar though they be), which are material to the present question. Section 1 of that Act provided that duty "shall be levied and paid upon the principal value ascertained "as hereinafter provided of all property, real or personal, settled "or not settled, which passes on the death of "a person dying after the commencement of that Part of the Act. Section 2 (1) goes on to provide: "Property passing on the death of the "deceased shall be deemed to include the property following, that "is to say . . . (b) Property in which the deceased or any other "person had an interest ceasing on the death of the deceased, to "the extent to which a benefit accrues or arises by the cesser "of such interest." I need not, I think, make any further references to section 2, only pausing to recall the fact (now so well established since the *Cowley case*²³) that sections 1 and 2, as regards the impact of estate duty, must be regarded as mutually exclusive.

Section 5 (3) is in these terms: "In the case of settled property, "where the interest of any person under the settlement fails or "determines by reason of his death before it becomes an interest "in possession, and subsequent limitations under the settlement "continue to subsist, the property shall not be deemed to pass "on his death." It was to that subsection that by section 48 of the Finance Act, 1938, was added the phrase "by reason only "of the failure or determination of that interest." I shall pass over section 7, which provides for the evaluation of interests and property passing, and confine myself to one reference in the definition section, section 22. By subsection (1) (f) it is provided that: "The expression 'property' includes real property and "personal property and the proceeds of sale thereof respectively "and any money or investment for the time being representing "the proceeds of sale"; and there is now no doubt that the widest interpretation has always been given, and must be given, to the word "property" as used in the Finance Act, 1894.

There is also no doubt, as will more clearly appear when I come to make my references to it, that the Court of Appeal in the

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²¹ [1951] 1 K.B. 721.²³ [1899] A.C. 198.²² [1907] 1 K.B. 163.

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Glossop case²⁴ thought that the question for decision depended, and depended primarily, on the effect of section 5 (3) of the Act. What then is the effect of that subsection, first of all, before the amendment? A simple case may be taken to illustrate the answer. Suppose that under a continuing settlement A, immediately before his death, was entitled to some limited or other interest contingently on his surviving B, and that A had died in B's lifetime. There is no doubt that at the date of his death A had an interest, a right of property, namely, a right which he would have enjoyed in possession had he survived B. That right or interest ceased or was destroyed upon his death during B's life; but since he had a property or interest which had ceased, then *prima facie* (and apart for the moment from section 5) it would appear that the circumstances would bring the case within the language of section 2 (1) (b), which I have read, as being property in which the deceased had an interest ceasing on the death of the deceased. I will assume that the circumstances that I give in my illustration are such that there was "a benefit accruing or arising" to some other person because the chance of A succeeding B was destroyed. Section 5 (3) then applies, in the simple case I have stated, to exempt the estate of A from liability for the duty on the ground that the interest of A will have failed or determined by reason of his death before it had become an interest in possession. It is to be observed that in the *Glossop* case,²⁴ from the facts in it which I have cited in brief, the deceased husband had an interest of the character I have mentioned. Had he survived his wife, he would then have enjoyed the whole income of the trust fund, including that part which produced the £200 a year payable to the wife during her life. But that was not his sole interest. He was immediately before his death in actual possession or enjoyment of the balance or excess of the trust income over £200 a year, and that right, that enjoyment, ceased or passed upon his death, altogether apart from and in addition to the cesser of his contingent interest which never did come into his possession.

It was said in argument by Mr. Stamp (and it was held by Harman J.) that the effect of the amendment made by the Finance Act, 1938, to section 5 (3) renders that subsection altogether inapplicable in any event to such a case as the *Glossop* case,²⁴ and therefore to this case because, as I have said, they are not simply cases where the deceased had a future interest

²⁴ [1907] 1 K.B. 163.

which ceased before it came into possession in the settled property and no more; and, if that is right, it follows that the *Glossop* case,²⁴ which was decided before the amendment, can no longer be applicable after the amendment. I do not say that I think the judge in this matter was wrong. It is not necessary for me in the circumstances to express any final view upon the point; but I am bound to say that there seem to me to be difficulties in the way of resting the decision in this case solely upon this view of the effect of the amendment. For myself, I prefer to base my decision on the second ground above indicated, namely, that apart from any question of the effect of the amendment to section 5 (3), the basis and validity of the decision in the *Glossop* case²⁴ has been displaced or destroyed by the later interpretation given to *Cowley's* case²⁵ by the House of Lords.

As regards the amendment, however, and so that I may complete what I have to say upon this part of the case, it has, I think, been accepted by both parties before us that its effect is correctly stated in Dymond on Death Duties, 11th ed., p. 414. The paragraph reads thus: "The words 'by reason only of the 'failure or determination of that interest' were added to 'section 5 (3) by section 48 of the Finance Act, 1938. These 'words, although their meaning is perhaps not altogether beyond 'doubt, are considered to confirm the interpretation previously 'adopted'"—and I insert "particularly by the estate duty office"—"and to make it clear that the exemption is limited to cases "where the fact that the deceased had an interest ceasing on his "death is the only element which might have given rise to a "claim for estate duty, that is, where the only potential charge "for estate duty would have been under section 2 (1) (b) of the "Finance Act, 1894. On this basis, section 5 (3) does not afford "exemption from duty chargeable under either section 1 of that "Act or any other sub-clause of section 2 (1)." And I add that Mr. Armstrong, in the course of his address to us, gave further cogent reasons for the view that section 5 (3) is applicable, and applicable only, in cases in which the tax (if exigible at all) would be exigible by virtue of section 2 (1) (b).

One of the difficulties (and they are not few in this matter) has been to detect with any sense of certainty under what section or subsection of the Act of 1894 the Court of Appeal in the *Glossop* case²⁶ treated the estate duty as chargeable. If the view of the court was that the £200 a year, or the part of the

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²⁴ [1907] 1 K.B. 163.

²⁶ [1907] 1 K.B. 163.

²⁵ [1899] A.C. 198.

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trust funds which produced the £200 a year, were treated as passing under section 1, then I agree that the effect of the amendment is now to show that section 5 (3) would be inapplicable to a case of that character. I am, however, not myself clear that the Court of Appeal did treat the duty in the *Glossop* case²⁶ as exigible (if exigible at all) under section 1. Nevertheless, I am clear that the Court of Appeal regarded the wife's fund or fortune in the *Glossop* case²⁶ as being properly divisible or severable for the purposes in hand into shares or "slices," as they have since sometimes come to be called in estate duty cases; but that as regards the "slice" attributable to the £200 a year payable to the wife, the interest of the husband was a future interest contingent on his surviving his wife; so that if that interest is taxable, it would be taxable, and taxable only, under section 2 (1) (b); and, if that be the right view, then section 5 (3) presumably would be applicable both before the amendment and afterwards.

It appears from what Mr. Pennycuick told us during the argument, that a rather wider effect was at one time alleged to be attributable to section 5 (3). It was suggested that if in fact a deceased person had at the time of his death an interest in settled property which ceased on his death before it had fallen into his possession, then no estate duty was exigible at all on his death in respect of the settled property, notwithstanding that the deceased might have had or had some other interest, including an interest in possession which did pass or cease on his death in the ordinary sense; and Mr. Pennycuick said that, acting on that view, certain devices had been invented whereby a settlor shortly before his death settled his property, say, on his son for life, then on himself for life after the son's death, and then finally to the son's children. Then, if the settlor died shortly thereafter, and the view which I have indicated was right, there would be no duty payable at all under the appropriate paragraph of section 2 (not being section 2 (1) (b)), because on this view the effect of section 5 (3), having regard to this reversionary life interest which was never enjoyed, would be to exempt the property from duty altogether; and for that reason, it is said, the amendment was introduced confining the exempting operation of section 5 (3) to the type of case which I have illustrated by my simple example, and that type of case only. That may or may not be the explanation of it; and if the Court of Appeal in the *Glossop* case²⁶ treated section 5 (3) as having so wide an import, then

²⁶ [1907] 1 K.B. 163.

again I would agree that the amendment altered the law. But my difficulty in thinking that the Court of Appeal did act upon such a view is that, if they did, it seems to me that logically they should then have gone on to say that on the death of the husband no estate duty would have been payable at all in respect of the wife's fund—not only in respect of the reversionary life interest which did not fall into possession, but equally no estate duty in respect of that part of the income which the husband had enjoyed, and upon which the court did clearly decide that duty was exigible.

I now come to the second, and as I think the more important, point in the case; and if I may state my conclusion at once, it is that the case of *de Trafford v. Attorney-General*,²⁷ in the House of Lords in 1935, gave a significance to the decision, or that part of the decision, in *Cowley's* case²⁸ which is relevant to this case, which was not apprehended when the *Glossop* case²⁹ was decided, and which makes that case now no longer good law. It therefore prevents this court from relying upon the authority of that case, or saying that either it or this case is properly distinguishable from *Cowley's* case.³⁰ I must therefore decide what in my judgment *de Trafford's* case³¹ held to be the principle which *Cowley's* case³² must be treated as having established. In the circumstances I must make some close analysis of the three cases that I have mentioned, and I hope I shall be excused if I take a little time in doing so.

It will be convenient to take the three cases in their chronological order, and I start accordingly with *Cowley v. Inland Revenue Commissioners*.³² The reports of the case in the Law Reports cover the decision both in the Court of Appeal and in the House of Lords; but first I must state briefly the facts, and I think it will suffice if I read from the headnote of the report in the House of Lords: "Father and son, tenant for life and tenant "in tail respectively, executed a disentailing deed by which they "granted the estates to a trustee to hold freed from the estate "tail to such uses as they"—that is, the father and son—"should jointly appoint. In exercise of that power father and "son mortgaged the estate in fee simple to a company as security "for a loan"—the company was the Prudential Insurance Company; it is convenient to mention that fact because of the references I shall make hereafter—"part of which was advanced

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²⁷ [1935] A.C. 280.³⁰ [1899] A.C. 198.²⁸ [1899] A.C. 198.³¹ [1935] A.C. 280.²⁹ [1907] 1 K.B. 163.³² [1899] A.C. 198.

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“ for the benefit of the father and part for the benefit of the son.
“ . . . Father and son then executed a deed of resettlement by
“ which the estates were charged with an annuity to the son
“ payable during the father's life, and subject thereto were
“ declared to be held in trust for the father for life and after
“ his death for the son for life with remainders over.” To that
short statement I must add this: The annuity payable to the
son, which was £3,000 a year, was in fact payable to him, his
executors, administrators and assigns, during the whole period of
the life of the father, that is the second Earl. The importance
of that fact is that in the circumstances the father, by surviving
the son, would not have enjoyed the £3,000 a year which the son
enjoyed under the provision that I have mentioned; the £3,000
a year went on being payable to the son's estate even though the
father survived him. Section 5 (3), therefore, was not applicable
in any circumstances as regards the amount of this annuity of
£3,000 a year; the father never had any future or contingent
interest in that sum, which ceased or determined before it came
into possession.

The point which came before the courts and the House of
Lords in the *Cowley* case³² may be accurately stated thus: It
was conceded that upon the death of the father, the second Earl,
there was a passing of the property. Until Lord Macnaghten had
delivered his speech the true significance of the distinction
between section 1 and section 2 had never been observed, and
indeed finds no part in the argument. That is the circumstance
which makes the case in that respect, as in others, one of the
most remarkable cases which have influenced our law. But the
argument for the taxpayer suggested that the subject-matter
which passed was but an equity of redemption; first, because
there was a prior charge in favour of the Prudential of £230,000,
so that the settled property was only the equity remaining
subject to that mortgage; second, because, according to the
argument, the property passing should also be properly treated
as reduced or assessed after deduction of the capital value of the
£3,000 a year which, as I have said, had been payable until the
death of the father, but had then ceased. The capital value of
the annuity was, I think, agreed at £65,000. The question then
was, were either or both those sums—£230,000 and £65,000—
properly to be deducted from the value of the estate for the
purpose of the tax? The Court of Appeal held that neither could

³² [1899] A.C. 198.

be deducted. The House of Lords held that the Prudential mortgage could, but that the capitalized value of the £3,000 annuity could not.

Now we have been taken with great care through the reports of the case in the Court of Appeal and the House of Lords; and there is, I think, no doubt at all that the argument, so far as it related to the sum of £65,200—which in all conscience was a large sum, but very small compared with the Prudential mortgage—was very much, if I may use the phrase, tied on to the tail of the argument as regards the Prudential mortgage; and the sort of point which we have debated in this case does not appear ever to have been clearly put or worked out in the debate in *Cowley's* case.³² Let me illustrate that by a brief reference to the judgments in the Court of Appeal.³³ I have said that the court decided against the subject both as regards the mortgage and as regards the annuity. The leading judgment was delivered by A. L. Smith L.J., and he considers at great length the question of the mortgage. The learned Lord Justice says this³⁴: “In my judgment, *for the above reasons*, the value of the benefit accruing upon the death of the second Earl must be ascertained under section 7 (7) (b) without making any allowance for the £230,000 mortgages. As regards the annuity of £3,000 a year charged upon the life estate of the second Earl, and payable thereout during his life to his son, for the reasons I have given above, I think that no deduction for this can be made.” That is all. The learned Lord Justice thought that the annuity was in all respects in *pari materia* with the mortgage.

The matter is stated particularly clearly, if briefly, by Rigby L.J.³⁵: “The annuities, amounting to £3,000, affected only the enjoyment by the second Earl of the property which passed, not the extent of the property passing, and cannot therefore be deducted.” I will only add that the third member of the court, who dealt with it no more fully, was Collins L.J., who sat as Master of the Rolls in the *Glossop* case.³⁴

I now turn to the report of the case in the House of Lords. It will be taking up undue time if I refer to the arguments, but it may be taken that the burden of the case plainly was all the time concentrated upon the Prudential mortgage, and the report deals with the argument as regards the annuity in a single short sentence.³⁵ With equal brevity and dispatch the House of Lords—and they took a different view from the Court of Appeal

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³² [1899] A.C. 198.³³ [1898] 1 Q.B. 367, 380.³⁴ [1907] 1 K.B. 163.³⁵ [1899] A.C. 198, 203.

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on the mortgage, which they regarded as being a prior charge anterior to (and therefore properly to be taken into account in reduction of) what passed under the settlement—nevertheless, as to the £3,000 annuity, rejected the appeal from the Court of Appeal. Lord Halsbury says ³⁶: “As to the claim by the appellant to a deduction in respect of the cesser of the rentcharge of £3,000 a year, it is enough to say that the argument in respect of it is hardly intelligible, and certainly the appellant has made out no case to establish it.” Lord Watson says ³⁶: “With regard to the second deduction claimed by the appellant, I have had no difficulty in coming to the conclusion that the decisions of both courts below were right. Very little was said about the point in the argument of the learned counsel for the appellant, and, so far as I can see, their reticence was not ‘injudicious’—and I venture to insert that for succeeding generations, I think, it was not so much injudicious as somewhat unfortunate. ‘The annuity, the capitalized value of which forms the subject of the claim, was regularly paid to the appellant during his father’s lifetime, and ceased to be payable on his death. No part of it formed a charge upon the equitable estate to which the appellant has succeeded, under the deed of resettlement, not in fee but in life-rent.’ If I may again insert an observation of my own, I read that language as meaning that by contrast with the Prudential mortgage, the estate itself, which was the subject of the settlement, was not liable to a charge in respect of this annuity, taking effect anterior and in priority to the settlement and to the interests under the settlement, as was the case with the Prudential mortgage. ‘In these circumstances I do not think it can, with any degree of plausibility, be maintained that the estate which passed to the appellant upon his father’s death has been thereby diminished or affected.’”

The next speech is that of Lord Macnaghten, and upon this matter he said tersely ³⁷: “As regards the minor point urged by Mr. Haldane, I think the claim to deduct the value of the £3,000 annuity must fail. There is no foundation for it; the property passed free from the annuity, and the Act makes no provision for any such allowance. There was a provision to that effect in the Succession Duty Act. At any rate, section 38 of that Act was so construed in this House: *Lord Braybrooke v. Attorney-General* ³⁸; *Inland Revenue Commissioners v.*

³⁶ [1899] A.C. 198, 207, 208.³⁸ (1861) 9 H.L.C. 150.³⁷ *Ibid.* 216.

" *Harrison*.³⁹ But there is no analogous provision in the Finance Act, 1894."

Lord Morris said that he failed to see any sound argument in the contention. Lord Shand dealt with it no less summarily; and finally Lord Davey devoted six lines to the matter thus⁴⁰: "As to the other point—whether the appellant is entitled to any deduction in respect of the cesser of the rentcharge of £3,000 a year to which he was entitled during the second Earl's lifetime—I agree with your Lordships that he is not entitled to that deduction, and I need not repeat the reasons which have been given."

Now the student of the law who read *Cowley's* case⁴⁰ in relation to this point might, I think, be excused for failing to discern that it had (as in my judgment was the case) decided a most significant and far-reaching question of principle. When I come to *de Trafford's* case⁴¹ I think it is impossible to resist the view that what I have said is correct, for putting it for the moment very briefly, that case must now, in my view, be taken to have decided this: Where the income of settled estate is held upon trusts not to pay it in aliquot shares to two or more persons, but to apply the income first in making an annual payment of a fixed sum or an annuity, whether that annuity is or is not charged upon any part of the estate, and subject thereto to pay the income to another person, then the entire property passes on the death of the latter person under section 1 of the Finance Act, 1894, and section 2 (1) (b) has no application whatever to it. How far-reaching that is may be seen if examples are taken (and the present is indeed not a bad one) in which the annuity or fixed annual payment takes up by far the largest part of the income of the whole estate; and so far, indeed, does the principle go that it is irrelevant that the person who succeeds to the whole income is the same person who has in fact enjoyed the annuity or annual payment. The result seems indeed a hard one, but though the point appeared most casually taken and briefly dealt with in the House of Lords as a minor point of little significance, it is my view that *de Trafford's* case⁴¹ beyond any question lays it down that that is what, as a matter of principle, *Cowley's* case⁴² in the House of Lords did decide.

If that is right, I have come to the conclusion (which I think is inevitable) that *Glossop's* case⁴³ proceeded upon a failure to

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³⁹ (1874) L.R. 7 H.L. 1.⁴² [1899] A.C. 198.⁴⁰ [1899] A.C. 198, 221.⁴³ [1907] 1 K.B. 163.⁴¹ [1935] A.C. 280.

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appreciate the significance of the decision in *Cowley's* case,⁴⁴ and is inconsistent with the principle which it is stated in *de Trafford's* case⁴⁵ that *Cowley's* case⁴⁶ laid down and established, and it is not merely that that case, quite understandably perhaps, was not fully appreciated, or that its significance was not fully realized. When *Glossop's* case⁴⁷ came before the court there were two matters in respect of which an obvious distinction appeared between that case and *Cowley's* case.⁴⁸ In the first place, as I have said or indicated, in the case of *Cowley*⁴⁸ the £3,000 annuity was in fact charged on the corpus of the settled estates. In the second place, for reasons which I have already intimated, section 5 (3) had, and could have had, no application in that case; and in *Glossop's* case⁴⁹ the members of the court thought beyond any doubt that the question turned essentially upon the applicability of section 5 (3).

I therefore come to the *Glossop* case.⁴⁹ It is reported in the court of first instance, before Walton J., and in the Court of Appeal. Except for one sentence in Walton J.'s judgment, to which Mr. Armstrong alluded (and to which I will, in deference to his very careful argument, also refer presently), I do not find it necessary, save by way of making the reference, to go to the report in the court of first instance.

I turn to the report in the Court of Appeal, and I hope that I have already sufficiently stated the facts of the case. Sir Richard Collins M.R. had taken part in the decision on *Cowley's* case⁵⁰ in the Court of Appeal, and there is no doubt that this case was referred to in the course of the argument. Other points were before the court in *Glossop's* case,⁵¹ but the relevant part of the case was the cross-appeal before the Court of Appeal, and is dealt with in these terms by the Master of the Rolls: "I come now to the cross-appeal in respect of that portion "of the wife's fortune which Walton J. held not to be subject "to estate duty. The learned judge has decided that," and then he quotes: "'the Crown is entitled to succeed except as to so "'much of the "wife's fortune" as is her share of the "'capitalized value of the fund which produced the income of "'£400 a year'; that is the end of the citation. "This part "of the case turns on other considerations. The question is

⁴⁴ [1899] A.C. 198.

⁴⁵ [1935] A.C. 280.

⁴⁶ [1899] A.C. 198.

⁴⁷ [1907] 1 K.B. 163.

⁴⁸ [1899] A.C. 198.

⁴⁹ [1906] 1 K.B. 284; [1907] 1 K.B. 163.

⁵⁰ [1899] A.C. 198.

⁵¹ [1907] 1 K.B. 163, 174.

"whether the case comes within section 5 (3) of the Finance Act, 1894." The learned judge then again quotes: "'as to 'so much of the corpus producing the £400 a year as was part 'of the wife's fortune the case is different. If he had survived 'his wife he would have been entitled to a life interest in this, 'and this interest failed on his death before it became an 'interest in possession. The question remains whether as to 'this any subsequent limitations continued to subsist after the 'death of the husband. I have already held in effect that 'upon the death of the husband the wife became entitled to 'this property absolutely. But it appears to me that, if this 'be so, it has been decided in *Attorney-General v. Wood* ⁵² 'that in such a case a limitation under the settlement does 'continue to subsist within the meaning of section 5 (3). In 'my judgment, therefore, so much of the wife's fortune as 'formed part of the capital which produced the income of £400 'a year must not be deemed to have passed on the husband's 'death.'" It is at that point that the quotation stops, but I will add the further sentence to which Mr. Armstrong very properly alluded: "In order to arrive at the amount, an apportionment will be necessary." Then the end of this part of the judgment is: "In my opinion it is clear that there was an interest 'of the husband in this part of the wife's fortune which failed or 'determined by reason of his death before it became an interest 'in possession. The question is whether, when the husband's 'interest failed, the subsequent limitation in favour of the wife 'could be said to continue to subsist," and the learned Master of the Rolls proceeded to deal with that point.

Before I turn to the other two judgments I make three observations. First, as I have stated more than once already, the Master of the Rolls plainly treated the question as turning on the applicability of section 5 (3) of the Finance Act, 1894, and (if I may say so) rightly and naturally, if for no other reason because thereby the case was clearly distinguishable from the decision in the *Cowley* case.⁵³ The second observation is that much turned in the *Glossop* case⁵⁴ upon whether one of the conditions of section 5 (3) was satisfied, namely, that there were continuing limitations under the settlement. The court held that there were, and that point may be disregarded for present purposes, since in this case it is irrelevant. But the third observation, which in this case I think to be the most significant,

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⁵² [1897] 2 Q.B. 102.⁵⁴ [1907] 1 K.B. 163.⁵³ [1899] A.C. 198.

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is this: Quite plainly, I think, from the judgment that I have read, the Master of the Rolls regarded the wife's portion as severable for the purposes in hand. I need not repeat anything I have read except, just by way of reminder, to refer to the passage quoted from Walton J.: "The learned judge decided "that the Crown is entitled to succeed except as to so much of "the 'wife's fortune' as is her share of the capitalized value of "the fund which produced the income of £400 a year," and, in the sentence which Mr. Armstrong has caused me to add to the citation, "an apportionment will be necessary." In other words, I think it is fundamental to this decision that the court, or the Master of the Rolls, treated this part of the wife's fund which produced the £400 a year as distinct and severable from the rest. It was as to that part of the fund that the husband had and only had a reversionary interest contingent on surviving his wife.

Having said so much, I will pass to the judgments of the other two members of the court. So far as Cozens-Hardy L.J. was concerned, he seemed more doubtful, but I think his doubts were much more directed to the question of the continuation of the settlement; on the main point he added little, if anything, to the Master of the Rolls' judgment. The Lord Justice said⁵⁵: "With reference to the cross-appeal, I confess that I have felt "more difficulty, but I am not prepared to differ from the other "members of the court." Then, after referring to another section of the Finance Act, 1896, which is not relevant here, he went on: "As regards section 5 (3) of the Finance Act, 1894, "I feel that the question is one of more difficulty, and I am "not, as I have said, prepared to dissent from the view taken "by Vaughan-Williams J. and Wright J. in *Attorney-General v. Wood*,⁵⁶ and by my colleagues in the present case, to the "effect that one must look at the moment of time when the "husband died to see whether there was any subsequent limitation subsisting," so that Cozens-Hardy L.J. is really adopting in its entirety, so far as is relevant to this case, what the Master of the Rolls had said.

Finally, there is the passage in Farwell L.J.'s judgment to which much attention has been directed, because I think he may have gone somewhat further than either of his colleagues. The Lord Justice said this⁵⁷: "Then with regard to the second "question, I also think that the learned judge was right. That "question turns on section 5 (3) of the Finance Act, 1894, which

⁵⁵ Ibid. 177.

⁵⁷ [1907] 1 K.B. 180.

⁵⁶ [1897] 2 Q.B. 102, 109.

“provides,” and then he reads it. “In this case there was in the first place a trust, during the joint lives of the husband and wife, to pay out of the entire income an annuity of £400 to the wife, and to pay the residue of the income to the husband, and then, after the death of either of them, there was a trust to pay the whole income to the survivor. It seems to me clear that the husband failed to take any interest in possession in such part of the wife’s fortune as is properly attributable to the production of the £400 annuity. To my mind it is a perversion of language to say that, in the events that happened, the husband ever had an interest in possession in the whole income, subject only to a charge of £400. He never had anything but a right to receive the residue remaining after payment of the annuity of £400 to the wife; and the trustees would have been guilty of a breach of trust if they had let him into possession of the whole income on his undertaking to keep down the annuity. Counsel for the Crown likened the case to that of a charge, but if there could be said to be any charge in favour of the wife, it would only be a continuing charge on income so that there would be a right to make up deficiency of income in one year by having recourse to the income of another year; but there is no charge on corpus, and no right in the husband to be let into possession.”

Now as regards the charge, what the learned Lord Justice was saying served at any rate to distinguish the case from the *Cowley* case,⁵⁸ which the Crown had cited in support of their argument, because in the latter case the annuity was, as I have said, charged on corpus. Farwell L.J. perhaps states less precisely the view which I think beyond doubt Walton J., the Master of the Rolls and Cozens-Hardy L.J. entertained—that the portion of the trust fund which produced the £400 a year was severable and distinct for the purposes in hand. But I do not think that he dissented from that view because of the phrase at the beginning of the passage that I have read: “It seems to me clear that the husband failed to take any interest in possession in such part of the wife’s fortune as is properly attributable to the production of the £400 annuity”; but he did go on to say that he thought it “a perversion of language” to say that a husband who was entitled to income subject to the £400 a year charge could possibly be said to have an interest in possession, subject only to a charge of £400; and in so far as he meant thereby that, for that reason, there could be no passing of the whole fund,

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⁵⁸ [1899] A.C. 198.

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it will be seen, as I think beyond a peradventure, that that statement is inconsistent with what Lord Russell of Killowen said in the *de Trafford* case.⁵⁹

So much for the *Glossop* case⁶⁰; and I think, as I have said, that the decision rests upon the circumstance that the court was able to regard that part of the fund which produced the £400 as being separate or severable, what is now called a "slice"; and that in respect of it section 5 (3) applied to provide exemption, as it had not been available in *Cowley's* case.⁶¹ I think the court also thought that, if it were necessary (or at least Farwell L.J. did) there was a further distinction in so much as in *In re Glossop*⁶² the annuitant had no charge on the corpus.

And so I come to the third of these cases, *de Trafford v. Attorney-General*,⁶³ which is reported in the House of Lords. Of the several misfortunes which I think have befallen the court in the present appeal—including the circumstance that in the case I have just read there is certainly no clear statement by any of the learned judges whether they regarded the case as falling within section 1 or section 2 (1) (b)—one is the misfortune that the *de Trafford* case⁶³ contains for our purposes a somewhat obscure and incomplete statement of the facts; and although the law reporters state that the argument sufficiently appears from the speech of Lord Russell of Killowen, I venture to doubt whether that observation really quite does justice to what may have fallen from the very learned counsel who appeared for the appellant. But the facts in *de Trafford's* case,⁶³ as stated in the law reports, have been amplified for us by Mr. Pennycuick, who has supplied us with the book in the House of Lords on the occasion of the appeal. The settlement in question of the *de Trafford* estates was undoubtedly very complicated, the settlement consisting not merely of certain deeds but also of two private Acts of Parliament. I will read first of all the first part of the headnote, and then I will make some addition, for which I am indebted to Mr. Pennycuick and the House of Lords book, because it will, I think, help to make clearer the true significance of this case. The headnote reads: "At the date of the order of "the Chancery Division hereinafter mentioned an estate of great "value consisting of real property, invested funds, and policies "of insurance was by a deed of resettlement and two private Acts "of Parliament vested in trustees for the life of Sir H. F. de T.,

⁵⁹ [1935] A.C. 280.⁶² [1907] 1 K.B. 163.⁶⁰ [1907] 1 K.B. 163.⁶³ [1935] A.C. 280.⁶¹ [1899] A.C. 198.

"the late baronet, to uses for raising £250,000 for portions for
 "the late baronet's younger children and subject thereto to the
 "use of Sir H. E. de T., the present baronet, for life with
 "remainder to his first and other sons in tail male; and it was
 "provided that the annual income of the estate should during
 "the life of the late baronet be held and applied by the trustees
 "in making certain payments and among them a payment of an
 "annual sum of £8,000 to the present baronet during the joint
 "lives of the late baronet and the present baronet," and then
 there is a reference to a further power to charge further sums.

Now the significant addition to those facts which Mr. Penny-
 quick enables me to make is that under the second Act—the
 private Act of 1914—the exact terms of the trusts during the
 joint lives were that the trustees were to make divers payments,
 and among them was this annual sum which happened to be at
 the rate of £8,000 at the date when Sir Humphrey Francis de
 Trafford died, but which was in fact a rising sum, and would, if
 Sir Humphrey Francis de Trafford had lived long enough, have
 risen to £10,000 a year. There were other payments to be made,
 and then this is the phrase: The net surplus income, after pay-
 ment or provision for these various other sums, was payable and
 distributable in the hands of the trustees upon discretionary
 trusts, one of the objects of discretion being the late baronet.
 The phrase "the net surplus income" is at any rate closely
 comparable to the phrase which we have in the present settle-
 ment (the Lambton settlement), "the rest of the income." It
 is clear from the speeches in the House of Lords in *de Trafford's*
 case⁶³ that the direction to apply the net surplus income was
 treated as being entirely equivalent to a direction "subject to
 "the payment of" such-and-such prior payments "the whole
 "income goes to A.B.," and it is that which has led me to
 construe the Lambton settlement in this respect in the way I
 have done.

The question which was raised in *de Trafford's* case⁶³ was
 whether, upon the death of the late baronet, Sir Humphrey
 Francis de Trafford, the estate duty which became payable was
 upon the footing of a passing of the entire estates, notwith-
 standing that the then present baronet, Sir Humphrey Edmund
 de Trafford (who came into possession and enjoyment of the
 income of the settled estates) had, immediately before the death
 of his father, been the recipient of the £8,000 a year annuity.
 It will be seen from those facts alone how close they are to the

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⁶³ [1935] A.C. 280.

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facts of the present case, and how difficult it would be, upon a matter of principle, to distinguish the two cases.

Unfortunately, in *de Trafford*,⁶³ so far as can be discovered, the *Glossop* case⁶⁴ was never referred to at all; but the speech of Lord Russell of Killowen has made clear, I think beyond a doubt, as I have said more than once, how significant and far-reaching were those parts of the speeches in the *Cowley* case,⁶⁵ which, at first sight, might appear casual and insignificant. Lord Russell (and the other noble and learned Lords were content to accept and agree with his speech) said this⁶⁶: "It is in regard "to the estate duty payable in consequence of his death"—that is, Sir Humphrey Francis de Trafford's death—"that two "disputed points have come before your Lordships' House for "determination. The first one is concerned with the annual sum "of £8,000, of which the present baronet was in receipt and had "been in receipt since he attained the age of thirty-five years on "November 29, 1925. That annual sum, since it was only payable out of the annual income arising during his father's life, "came to an end with his father's death; but on the happening "of that event he became tenant for life in possession of the "estates, and as such entitled, during his life, to the whole "income arising therefrom subsequently to his father's death. "In these circumstances it is argued by the appellants (who are "the trustees and have accepted liability for the duty payable) "that a notional portion of the estates (namely, so much as was "required to produce £8,000 per annum) neither passed on the "death of the late baronet within the meaning of section 1 of "the Finance Act, 1894, nor should be deemed to be included "in property so passing by reason of section 2 of that Act. "Alternatively it is contended that no benefit accrued or arose "to the present baronet by reason of the cesser of his right to "receive the £8,000 a year.

"My Lords, these are contentions which, in my opinion, we "are precluded by authority from adopting. I am unable to "distinguish this case from *Earl Cowley v. Inland Revenue Commissioners*.⁶⁷ In that case two points arose for decision. "The first related to a sum secured by a mortgage, which had "been created on the fee simple of the Morningson estates before "the execution of a settlement of those estates upon trust that "the third Earl Cowley should receive during the life of his

⁶³ [1935] A.C. 280.

⁶⁶ [1935] A.C. 288.

⁶⁴ [1907] 1 K.B. 163.

⁶⁷ [1899] A.C. 198.

⁶⁵ [1899] A.C. 198.

“father, the second Earl, a sum of £3,000 a year, and, subject
 “to and charged as aforesaid, for the second Earl for life and
 “after his death for the third Earl for life with remainders over.

“The second point arose in regard to the annual sum of
 “£3,000. On the death of the second Earl the Crown sought to
 “recover estate duty on the footing of the estates being valued
 “as unincumbered by the mortgage. It was held by your
 “Lordships’ House that the case fell under section 1 of the
 “Finance Act, 1894, and not under section 2 (b) of that Act;
 “and further that the property which passed on the death of the
 “second Earl was only the property which was settled—namely,
 “the equity of redemption and not the unincumbered fee.

“The third Earl, however, claimed that no duty should be
 “paid in respect of the annuity of £3,000 since no benefit had
 “accrued to him by the cesser of the second Earl’s interest, and
 “he claimed to deduct the capitalized value thereof. It was
 “decided that there was no foundation for such a claim.

“It was urged before us here that the second point in the
 “*Cowley* case⁶⁷ had only been argued as a question of deduc-
 “tion from the value of the property which passed; but that the
 “present contention was a question of reduction of the quantum
 “of the property which passed on death; and it was said that
 “the reasoning which decided the first point in the *Cowley*
 “case⁶⁷ was applicable here to establish that the quantum of
 “the property which passed on the death should be reduced by
 “excluding the notional portion of the estates which I have
 “indicated above. It was further said that the *Cowley* case⁶⁷
 “was distinguishable on the facts.

“For myself, I see no distinction of substance on the facts;
 “for the fact that the life estate had been divested from the
 “tenant for life and vested in trustees during his life, can of
 “itself cause no different answer to be given to the question
 “what property passed on his death. The mortgage in the
 “*Cowley* case⁶⁷ was outside and anterior to the settlement, and
 “independent of it. The annual sum of £8,000 in the present
 “case was payable out of income arising under the settlement.
 “The reasoning which decided the first point in the *Cowley*
 “case⁶⁷ cannot therefore apply. Nor can I see any justification
 “for the exclusion of any portion of the estates from the property
 “passing on the death. The present baronet’s right to an annual
 “sum of £8,000 gave him no right to the receipt of any
 “particular items of the annual income, or to the income of

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⁶⁷ [1899] A.C. 198.

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“ any particular portion of the estates. His right to receive an annual sum of £8,000 ceased on the death of the late baronet; his right, which then arose, to receive all the rents was a new and a different right. There was never either in fact or in law anything resembling a surrender of the life estate to the immediate remainderman, as was the case in *Attorney-General v. Beech*.⁶⁸ In my opinion it is impossible to distinguish this case from the *Cowley* case.⁶⁹ The property as a whole passed to the present baronet freed from the trust or liability to pay the annual sum, which trust or liability automatically came to an end with the death of his father,” and then Lord Russell cites from Lord Watson’s speech the part of it which I have already quoted.

Now I venture to think that it is not surprising that, as Lord Russell states, the contention was that in the *Cowley* case⁶⁹ all that was argued was a question of deduction from the value of the property; but quite clearly Lord Russell was not deterred by that circumstance from setting out in characteristically clear and unambiguous phraseology what the *Cowley* case⁶⁹ decided. Let me observe what Lord Russell quite plainly negatived and rejected: He negatived and rejected the view which formed the basis of the argument in *de Trafford*⁷⁰ “ that a notional portion of the estate (namely, so much as was required to produce £8,000 per annum) neither passed on the death of the late baronet within the meaning of section 1 of the Finance Act, 1894, nor should be deemed to be included in property so passing by reason of section 2 of that Act.” “ These are contentions,” said Lord Russell, “ which in my opinion we are precluded by authority from adopting ”—yet those were the very contentions, as I interpret the case, which formed the basis of the decision in *In re Glossop*.⁷¹ And the passage which I have read at the end of Lord Russell’s opinion makes quite clear, I think, that in the view of the House of Lords, where a person is entitled to an annuity or annual sum payable out of income, then on the death of the person entitled to the rest of the income there is a passing of the whole estate under section 1; and in that respect the case differs from the case where the income is payable in aliquot shares to two or more persons. That distinction between aliquot shares and an annuity or annual fixed sum may, no doubt to many, seem a narrow and fine one. Perhaps it is; but that it exists and is clearly established is, I think, not

⁶⁸ [1899] A.C. 53.

⁶⁹ [1899] A.C. 198.

⁷⁰ [1935] A.C. 280.

⁷¹ [1907] 1 K.B. 163.

now open to any doubt; and if any citation were necessary for this purpose I cite the recent case decided in this court of *In re Duke of Norfolk*,⁷² and in particular the passages which were cited from the judgment of my brother Jenkins at page 484 and following of the report. I am unable to read *de Trafford's* case⁷³ as doing other than deciding and establishing that the *Cowley* case,⁷⁴ whatever may have been thought at the time or subsequently before 1935, covers as a matter of principle all cases where income under a settlement is held upon trust to pay an annuity or other fixed sum, and subject thereto to pay the balance to A.B., and then A.B. dies—in all those cases, as I have said, there is a passing of the whole property; and it is irrelevant that the person who succeeds to the whole income is the same person who enjoyed the annuity or fixed annual sum.

Mr. Armstrong attempted to persuade us that, even so, we could and should hold ourselves bound by the decision in the *Glossop* case⁷⁵ on the basis that there were between the *Glossop* case⁷⁵ and the present case on the one hand, and the *Cowley* case⁷⁶ and *de Trafford's* case⁷⁷ on the other, sufficient distinctions, however artificial—however one might be inclined to reject them on the grounds of logic or good sense—to justify, and indeed compel, us to say: This case is within the four corners of the *Glossop* case⁷⁸; therefore we are bound to follow it, and it will be for the House of Lords to say that it is wrong. That might be so if the distinctions were such that we could, consistently with loyalty to the decision in *de Trafford*,⁷⁹ accept them. But I think they are not. The first distinction rested on the existence in the *Cowley* case⁸⁰ of a charge on corpus, whereas in the present case there is no charge at all, or at most only a continuing charge on income. But that distinction is surely quite untenable in view of the general language of Lord Russell of Killowen in *de Trafford*⁸¹ (where equally there was no charge), which I have already read, and do not repeat.

Secondly, it was argued that there was a distinction, at once perceptible and intelligible, between a case where the settled property consists of realty, or the proceeds of the sale of realty held as capital money, on the one hand, and pure personalty on the other; and Mr. Armstrong drew attention to the fact that

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⁷² [1950] Ch. 467.⁷³ [1935] A.C. 280.⁷⁴ [1899] A.C. 198.⁷⁵ [1907] 1 K.B. 163.⁷⁶ [1899] A.C. 198.⁷⁷ [1935] A.C. 280.⁷⁸ [1907] 1 K.B. 163.⁷⁹ [1935] A.C. 280.⁸⁰ [1899] A.C. 198.⁸¹ [1935] A.C. 280.

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possession of real estate involved a certain degree of physical enjoyment of the actual property in a sense which is inapplicable to investments; but again I am quite unable to attach any sufficient significance to that distinction as to justify our departing from the principle so plainly enunciated by Lord Russell, more particularly when regard is had to the width of the definition I have read from section 22 (1) (f) of the Finance Act, 1894, and to the fact that for estate duty purposes no distinction has ever been drawn between realty and personalty in any sense in circumstances relevant to the present case.

I confess that the conclusion at which I have arrived may be thought somewhat regrettable partly because (as is stated and frankly conceded) for 45 years the decision in the *Glossop* case⁸² has, I believe, been followed as a matter of practice as governing cases of this character; and it may be that many persons have acted in reliance upon it. And the distinction is in any case a fine one between aliquot shares and provisions for payment of a fixed annual sum, and subject thereto to pay the residue of the income. I ventured to suggest to Mr. Pennyquick that conveyancing ingenuity of no very extravagant or remarkable order could very easily frame trusts of a settlement so as to produce by fluctuating fractions the substantial equivalent of the present case; and, although I do not decide it, I should imagine that if success crowned those efforts, the result would be to give rise to a much smaller liability for duty. These, however, are matters for Parliament and not for the court. Lord Russell himself, I think, has joined those who have somewhat regretted the sharp distinction between section 1 and section 2 which the *Cowley* case⁸³ must be taken to have drawn, and its decision that in cases such as this it is section 1, and not section 2 (1) (b) which applies. But the duty of this court is to decide the case as best it can according to the law as it interprets it; and giving my best attention to this matter I have been unable to avoid the conclusion that the basis upon which the *Glossop* case⁸⁴ is quite clearly shown to have rested was cut away and destroyed in quite unmistakable language by Lord Russell of Killowen in the *de Trafford* case,⁸⁵ and I therefore think that the appeal must be dismissed.

BIRKETT L.J. I am in complete agreement with the judgment of the Master of the Rolls which has just been delivered, and for

⁸² [1907] 1 K.B. 163.

⁸³ [1899] A.C. 198.

⁸⁴ [1907] 1 K.B. 163.

⁸⁵ [1895] A.C. 280.

myself have nothing that I wish to add. I agree with the result that he has announced.

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ROMER L.J. I also agree.

It seems to me that the first subject to inquire into in this case is as to the nature and quality of the £400 a year to which the wife was entitled under clause 2 of the settlement. In my opinion, the wife's right to prior payment out of the annual income of this sum was a right to an annuity, and cannot be regarded as a mere share of income, or an income interest in a separate and aliquot part of the settled fund. Had the wife surrendered her right to the £400, it is, in my judgment, impossible to say that there would have been a resulting trust as to this income; for it is clear, on the construction of clause 2 of the settlement, that it would have accrued to the residuary income which was payable to the husband. This residuary income is described in much the same way as the balance of income was described in the *de Trafford* case.⁸⁵ In that case the ultimate income was described as "any surplus income remaining after" certain payments had been made, including the £8,000 per annum which was under discussion in that case. The recipient of that sum was regarded by the House of Lords as an annuitant, and not as a person entitled to the income of such portion of the settled estate as would produce that sum.

It appears to me that the Court of Appeal in *Attorney-General v. Glossop*⁸⁶ undoubtedly treated the wife in that case as a person to whom the income of an appropriate part of the corpus of her fund had to be paid, that is to say, as a person who was in the possession of that income. The result of this was to exempt from duty the husband's prospective interest in such income on his death by virtue of section 5 (3) of the Finance Act, 1894, leaving only the rest of the fund exigible to the duty. In the light of the decision in *Earl Cowley v. Inland Revenue Commissioners*,⁸⁷ as explained by the House of Lords in the *de Trafford* case⁸⁸—because, as my Lord has pointed out, the full significance of the relevant point in that case did not apparently emerge very clearly—it seems to me that the approach by the court to the position as it existed in *Attorney-General v. Glossop*⁸⁹ was erroneous.

On the footing that an income interest, such as that of the

⁸⁵ [1935] A.C. 280.

⁸⁸ [1935] A.C. 280.

⁸⁶ [1907] 1 K.B. 163.

⁸⁹ [1907] 1 K.B. 163.

⁸⁷ [1899] A.C. 198.

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wife, could and should be treated on what has been described as the "slice" principle, then the decision at which the court arrived would necessarily follow. It is, however, now clear that the recipient of such an income interest has no right to any specific income, for his position is no more and no less than that of an ordinary annuitant. That was clearly stated, I think for the first time, by Lord Russell of Killowen in his speech in the *de Trafford* case, where he said⁹⁰: "The annual sum of £8,000 "in the present case was payable out of income arising under "the settlement. The reasoning which decided the first point "in the *Cowley* case⁹¹ cannot therefore apply. Nor can I see "any justification for the exclusion of any portion of the estates "from the property passing on the death. The present baronet's "right to an annual sum of £8,000 gave him no right to the "receipt of any particular items of the estates. His right to "receive an annual sum of £8,000 ceased on the death of the "late baronet; his right, which then arose, to receive all the "rents was a new and a different right."

If this principle had been present to the minds of the members of the court in the *Glossop* case⁹² it must, I think, have resulted in a conception different from that which formed the basis of their decision. It must necessarily have led to the conclusion that the wife had no beneficial interest in any individual particles of income arising from the trust fund, but an interest in the income as a whole; and that during her lifetime, as no particles of income were dedicated to the wife's exclusive benefit, the husband was entitled in possession to the whole income, subject only to the payment out of that income generally of the wife's annuity. From this it must follow that on the husband's death in the present case there was a passing of the settled fund as a whole, and not merely the passing of a segregated part thereof; and for the reasons which my Lord has stated more elaborately (and of which I have given the merest summary) it seems to me there is no escape from the conclusion which the Master of the Rolls has expressed; and for my part I share his regret that we should be compelled to this conclusion.

The general scope of the Finance Act, 1894, was described in the following well-known passage in Lord Macnaghten's speech in the *Cowley* case⁹³: "My Lords, the principle on which the "Finance Act, 1894, was founded is that whenever property "changes hands on death the State is entitled to step in and

⁹⁰ [1935] A.C. 290.

⁹¹ [1899] A.C. 198.

⁹² [1907] 1 K.B. 163.

⁹³ [1899] A.C. 198, 210.

"take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding." It has been pointed out by Harman J., in his judgment in this case (and it is plainly true), that by reason of her husband's death, the widow here has only become richer by the difference between the £400 a year, which she had been receiving in her husband's lifetime, and the total income of the fund, and nevertheless estate duty will be leviable on the entire fund as the result of this decision. It appears to me that that result is difficult to reconcile with the statement of principle which Lord Macnaghten expressed in the passage from his speech that I have cited. But there it is. In my view, the conclusion is inevitable; and if any change be thought desirable in such a case as this to meet what to my mind is an undoubted hardship, then it would be for the legislature to make such change as it thinks proper, for it is outside the powers of this court so to do. I agree, therefore, with the result that my Lord has stated.

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Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne; Solicitor, Inland Revenue.*

H. C. G.

In re BATLEY, DECD. (No. 2).
PUBLIC TRUSTEE v. HERT AND OTHERS.

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[1952 B. 349.]

Evershed M.R.,
Jenkins and
Hodson L.JJ.

Will—Annuity payable free of income tax—Annuity becomes one-third of the income of the testator's estate after deduction of income tax—Annuitant and her husband jointly assessed for income tax—Repayments in respect of annuity recovered by annuitant or her husband—No liability to account to trustee for repayments.

A testator by his will, which was made shortly after his divorce and remarriage, bequeathed "free of duty" to his former wife "an annuity of four hundred and sixteen pounds for her life . . . such annuity to be considered as a continuation of the alimony which I am paying her during my lifetime." The will further provided that if at any time during the lifetime of his present wife "such annuity of four hundred and sixteen pounds should

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“exceed the amount of one-third of the total income of my estate after payment of income tax, then and in such case the amount to be paid . . . by way of such annuity shall be such one-third of the total income of my estate after payment of income tax.”

At the time of this appeal the provision reducing the amount of the annuity applied. The annuitant was married and her husband paid income tax in respect of their joint estates and received from the Revenue such reliefs as they might be entitled to. The question arose whether either the annuitant or her husband was liable to account to the trustee of the testator's estate for relief recovered of tax paid in respect of the annuity:—

Held, that there was no obligation to account to the trustee for any relief obtained from the Revenue either by the annuitant or her husband in respect of the annuity.

The rule laid down in *In re Pettit* [1922] 2 Ch. 765 (and since applied in a number of cases) requiring a person to whom an annuity is bequeathed free of income tax to account for any relief from the Revenue for tax paid in respect of the annuity, applies only to a case where the annuity bequeathed is of a fixed amount free of tax; and it so applies because the testator's intention was that the annuitant should receive the fixed amount free of tax and no more.

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

The testator, Charles Gurson Batley, a solicitor, married as his first wife the defendant Dorothy Hert, who divorced him on December 21, 1936, and was awarded by the court £7 a week as alimony. The testator married on January 27, 1937, a lady who since his death had remarried and was now Mrs. Grace Lucy Smith. By his second wife he had two children. During his lifetime he paid to his ex-wife Dorothy by way of alimony a sum amounting to one pound a week in excess of the sum ordered free of income tax. The testator died on May 4, 1947.

By his will dated January 27, 1937, he bequeathed “free of duty to my former wife Dorothy Batley an annuity of four hundred and sixteen pounds for her life without power of anticipation during any coverture such annuity to be considered as a continuance of the alimony which I am paying to her during my lifetime and to be paid to her at the rate of thirty-two pounds every four weeks, in this way thus continuing after my death the payments of alimony which I am making to her during my lifetime.” The bequest then continued: “But if at any time during the lifetime of my wife the said Grace Lucy Batley such annuity of four hundred and sixteen pounds should exceed the amount of one-third of the total income of my estate

“ after payment of income tax then and in such case the amount
 “ to be paid to the said Dorothy Batley by way of such annuity
 “ shall be such one-third of the total income of my estate after
 “ payment of income tax accordingly to be paid in similar manner
 “ by equal four-weekly payments and I declare that the decision
 “ of my trustees as to what is the amount of such income in any
 “ year shall be final.”

The testator then directed that the income of his residuary estate was to be payable, subject to the above annuity, to his widow for life; and after her death, should there be any child or children surviving her, he directed his trustees “ to set aside a
 “ sufficient portion of the capital of my said estate to continue
 “ the payment of the said annuity of four hundred and sixteen
 “ pounds to the said Dorothy Batley, or if at such time such
 “ annuity . . . should exceed the amount of one-third of the total
 “ income of my estate after payment of income tax then and in
 “ such case the amount to be thus set aside shall be a sufficient
 “ portion of the capital of my said estate to pay as an annuity to
 “ the said Dorothy Batley an annual sum equal to such one-third
 “ of the total income of my said estate after payment of income
 “ tax accordingly and to pay the said annuity to the said Dorothy
 “ Batley for her life accordingly.”

On November 22, 1950, application was made to Vaisey J., by summons, to determine whether, upon the true construction of the will, the annuity was payable free from, or only subject to, income tax. Vaisey J. decided that the annuity was subject to income tax. On appeal to the Court of Appeal,¹ the court held, reversing the decision of Vaisey J., that the annuity was payable free of income tax, but without prejudice to the question whether annuitant was liable to account for income tax relief in accordance with the rule in *In re Pettit*.²

The present proceedings were brought to ascertain whether any relief or allowances by way of income tax recovered or recoverable in respect of and as far as was attributable to the annuity was payable to the trustees of the will in accordance with the rule in *In re Pettit*.²

Evidence had been given by the annuitant that her present husband, J. A. Hert, was assessed to income tax in respect of their joint holding and was alone entitled to claim income tax reliefs, and that she was not entitled to make any claim for such reliefs. Vaisey J. held the rule in *In re Pettit*² applied, the present case

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¹ [1951] Ch. 558.² [1922] 2 Ch. 765.

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being covered by *In re Maclellan*³; *In re Eves*⁴; *In re Tatham*⁵; *In re Williams*⁶; *In re Arno*⁷ and *In re Lyons*.⁸ The only difficulty arose from the fact that it was the husband of the annuitant and not the annuitant herself that was liable to pay the income tax and entitled to claim any appropriate reliefs; but in his view the husband would hold any relief obtained in respect of the annuity impressed with a trust in favour of the testator's estate.

The annuitant and her husband appealed. The estate of the testator is now such that the annuity is only that payable under the second limb of the gift by reason of income of £416 a year exceeding one-third of the total income of the estate after payment of income tax.

F. Bowyer for the annuitant and her husband. *Vaisey J.* was in error in his decision (1) on the ground that *In re Jones*⁹ applied on the merits and construction of the bequest of the annuity, and (2) on the ground that the annuitant is a married woman living with her husband, so that *In re Pettit*¹⁰ could not apply. The basis of the decision in that case was that the annuitant must not receive more by a side wind than the testator has given to her. That reason for the decision does not apply here. It is true that either a wife or a husband can apply for separate assessment, but it would go further than the court has ever done before to treat the rule in *In re Pettit*¹⁰ as applicable here. It must be remembered that the wife has a right to choose whether she should be separately assessed or not.

C. F. Fletcher Cooke for the other beneficiaries under the testator's will. If the decision of *Vaisey J.* was wrong, it would mean that the annuitant would be getting more than the one-third of testator's estate less income tax. It would really involve giving a windfall to the annuitant. *In re Tatham*¹¹ and *In re Williams*¹² are directly applicable here. To sum up, the issue surely is to consider the position and the words used as to replacing the annual sum of £416 by a smaller amount consisting of one-third of the income of the estate less income tax; how can the annuitant possibly be entitled to a larger amount after the testator has so clearly fixed the amount of the annuity.

D. H. McMullen for the Public Trustee.

No reply was called for.

³ [1939] Ch. 750.

⁴ [1939] Ch. 969.

⁵ [1945] Ch. 34.

⁶ [1945] Ch. 320.

⁷ [1947] Ch. 198.

⁸ Ante, 129.

⁹ [1933] Ch. 842.

¹⁰ [1922] 2 Ch. 765.

¹¹ [1945] Ch. 34.

¹² [1945] Ch. 320.

EVERSHED M.R. [after reading the material parts of the testator's will]:—The first question which arose out of the directions in the will was whether the provisions for the payment of £416 a year for her life to the appellant was free of tax or not. That matter came before the Court of Appeal.¹³ It is plain, I think, that the court, in considering the problem, applied their minds, if not exclusively at least primarily, to what I may call the first limb of this provision, the bequest of an annuity of £416 a year. That inference I draw from the reasoning of the members of this court, or the two of them who gave judgment. And the conclusion was that the gift was free of income tax; in other words, that it was a gift of the net figure of £416. The circumstances which most strongly influenced the court in coming to that conclusion were the references to the alimony which the testator had been paying during his life. Thus (by way of reminder of the language), "such annuity," he said, was "to be considered as a continuance of the alimony which I am paying"; and again, "in this way thus continuing . . . the payments of alimony which I am making." It was proved in evidence quite plainly that the testator had in fact exceeded the amount of an order made and had paid a sum of £8 a week, free of any sort of deduction, by way of alimony. It is true that the will which we are construing was made very soon after the divorce, but it remained unaltered during the 10 years of life which still remained to the testator. On that matter, then, this court concluded that the sum bequeathed was a net sum; although the second and third limbs of the bequest were rather relied on by counsel appearing for the widow as indications the other way.

The court, however, left open the question whether *In re Pettit*¹⁴ applied or not, that is, whether the annuitant was liable to account to the trustees for any repayment from the revenue of tax paid in respect of the annuity. It was left open because it was thought (as appears from the judgment of Cohen L.J.) that there might be some evidence available of the practice of the testator. That expectation does not appear to have been fulfilled, and there seems to be no material evidence on that point.

So in due course the matter again appeared before the courts, and Vaisey J. was asked to decide whether *In re Pettit*¹⁴ applied. The matter, I may say, has been somewhat complicated in this case (for the first time in cases of this character, so far as is known) by the fact that the annuitant remarried, so that for tax

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purposes her income is at the moment brought into account by her husband, and he it is who pays the tax due and makes any claim for repayment. The husband has therefore been joined as a defendant. As it turns out, I need not pause to say more about that circumstance.

The judge was of opinion in this case that *In re Pettit*¹⁴ did apply. He rejected the argument based on the testator having paid without any demur £8 a week during the 10 years which elapsed between the divorce and his death and on his not having made any suggestion to his former wife that she should account to him for any rebates that she got—and, indeed, it was not proved that she ever made any such claims against the Revenue. The judge did not therefore think that the circumstances concerning the payments of alimony really were material. He came to the conclusion that the effect of the numerous cases which have come before the courts from the time of *In re Pettit*¹⁴ up to the present (of which *In re Lyons*,¹⁵ a decision of this court, was the last), was that, in the absence of very strong language, a gift of an annuity of X pounds per annum must be construed as showing that the testator's benefaction was intended to be that fixed sum as an annuity. The result was therefore that, if the annuitant obtained a repayment which would give her more than the fixed sum, she was liable to pay the sum recovered to the trustees of the will.

I think it clear, as I read Vaisey J.'s judgment, that he considered particularly the first limb of this particular gift, and that the arguments were directed largely to it. It is true that Mr. Bowyer before the judge said that the impossibility of applying the *In re Pettit*¹⁶ principle to the second limb should have, so to speak, a reflection back upon the first. It appears that the situation of the estate now is such that at all material times—certainly at the present time—the condition has been fulfilled that brings into play the second limb by reason of the sum of £416 exceeding one-third of the total net income after deduction of income tax. Therefore the real question we have to decide is: what is the effect, so far as any possible repayment of tax is concerned, of this second limb? For my part, I think that this second limb is plain in its effect. Let me read the material part of it again: “But if at any time during the lifetime of my wife” (the defendant Mrs. Smith) “such annuity of four hundred and “sixteen pounds should exceed the amount of one-third of the

¹⁴ [1922] 2 Ch. 765.

¹⁶ [1922] 2 Ch. 765.

¹⁵ *Ante*, 129.

"total income of my estate after payment of income tax." Now let me pause there. What is the calculation which the trustees have to make? They have to see whether one-third of the total net income—that is, the income in their hands for distribution after payment by them of income tax—is less or more than £416. If they find that it is less than £416, then, the testator goes on, "the amount to be paid to" (the annuitant) "by way of such annuity shall be such one-third of the total income of my estate after payment of income tax."

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In all the *In re Pettit* cases ¹⁶ (as I will call them) the problem has arisen in regard to an annuity of a fixed amount per annum, and these cases have proceeded on the view that payment of such a sum, no more and no less, was the intention of the testator and the limit of his bounty. Here (the event contemplated having happened) what the annuitant is entitled to "by way of an annuity" would seem to be one-third of the total income after deduction of tax, that is, one-third of the amount left in the trustees' hands available for distribution when they have paid the income tax for which they are responsible. The whole principle of *In re Pettit* ¹⁶ seems to be inapplicable to a provision of that character. Indeed, Mr. Fletcher Cooke was forced, I think, to the conclusion that if he were right then there would have to be a different calculation each year in order to ascertain the fixed sum to be substituted for the sum of £416. Enormous administrative difficulties would arise if that view prevailed. But unless this were the result I am far from clear what it was suggested would happen when once any repayments of tax had been recovered and paid into the hands of the trustees so that the distributable income in their hands was increased beyond the original figure. When there is a provision for distributing income in shares among beneficiaries, a beneficiary is entitled to get from the trustees the due proportion of the net figure after tax has been paid; and the trustees are treated as having paid tax on his or her behalf on the gross sum, so that the beneficiary also gets, as part of the benefaction, such rights in respect of that tax as are, so to speak, attached to the amount received. The whole conception of a gift of a third (or any other fraction) of the net income is for this purpose fundamentally different from the ordinary case of a fixed sum in cash.

There remain two problems. It was argued below, and was argued before us by Mr. Bowyer, that the result (which seems

¹⁶ [1922] 2 Ch. 765.

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to me to be really unanswerable) as regards this second limb reflects back upon the first limb and so makes *In re Pettit*¹⁶ inapplicable altogether. It was said then that the effect would be of reading into the first limb, first, the tax-free provisions applicable to the alimony, and, secondly, the qualification that by "free of tax" is meant "free of tax at the standard rate." The judge was against that view. For my part, I prefer to express no opinion upon it, except to say that I am far from persuaded that the judge was not right upon it. But we are concerned with the second limb; and if the first limb and the second limb are not in all respects perfectly coherent, it is not, I regret to say, the first time that that result has been achieved by a testator.

A similar problem may arise under the third limb, because there is (as Mr. Fletcher Cooke pointed out) at least a case for saying that if the annuitant should survive Mrs. Smith, and the sum then directed has to be set aside, the effect of the will might be to substitute for the original figure of £416 some new fixed figure that has then to be calculated, and if there is then an obligation to pay, as an annuity, that figure per annum, there would obviously be a strong argument for saying that thenceforward *In re Pettit*¹⁶ applied once more. That event, however, may not happen, and in any case the persons interested to argue one way and another may not be in all respects the same as those now before the court. Therefore I express no view upon it.

It is unfortunate indeed if yet further applications have to be made to the court. That may be the unhappy result of a provision which obviously (from the view taken by the Court of Appeal on the first occasion) is far from perfect in its expression and depends, for its true construction, in part, upon the reference to a continuance of the alimony paid during the testator's lifetime. I propose to adhere for present purposes to the question which on the evidence must now be answered, and on that point the answer, in my judgment, is that since the second limb of this provision has taken effect the annuitant is entitled to what she is there given, namely, one-third of the net income without any obligation on her part or her husband's part to account for any rebates of income tax that he or she may receive.

I think, therefore, that the order of the judge must be varied. Indeed the strict view will be to set aside the order made by him and substitute an order which will be confined to a declaration as

¹⁶ [1922] 2 Ch. 765.

to the effect of this second limb at present applicable, and, I should assume, likely to remain applicable, at any rate for the foreseeable future.

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JENKINS L.J. I agree. When it was decided in this court upon the first summons issued in the matter of this estate that the annuity of £416 given to the testator's first wife was free of income tax, the question of the application or exclusion of the principle stated in the well-known case of *In re Pettit*¹⁶ was expressly reserved, and that was the question that Vaisey J. had to decide when the summons, which forms the subject of the present appeal, came before him for hearing. In deciding that question the judge appears, so far as one can tell from his judgment, to have confined his attention to, or at all events concentrated on, what my Lord has called the first limb of the provisions relating to the annuity to be paid to the testator's first wife. The judge found himself unable to hold that the language of that provision was such as to exclude the application of the principle of *In re Pettit*.¹⁶ He held that the circumstances that the annuity of £416 was expressed to be by way of continuance of the alimony which the testator was paying his first wife during his lifetime, and that, while the alimony was being paid, no question was ever raised on either side about the obtaining of reliefs by way of repayment of tax or the destination of those reliefs, were not sufficient to displace the well established rule in *In re Pettit*.¹⁶

If the first branch of the bequest had stood alone, it would have been reasonably plain that the judge had come to a correct conclusion on the principle laid down in the cases, for the position would then have been simply that the testator had given an annuity of a specified amount in terms and in circumstances justifying the conclusion that it was to be paid free of tax. In the absence then of any indication of a contrary intention, the principle of *In re Pettit*¹⁶ would have been brought into play. But the first branch of the bequest cannot be read in isolation; it must be looked at in conjunction with the second branch, which makes special provision for the event of the annuity of £416 at any time during the lifetime of the testator's second wife exceeding one-third of the total income of his estate after payment of income tax. In that event the testator makes a gift to the first wife in these terms, "then and in such case the amount to be paid to

¹⁶ [1922] 2 Ch. 765.

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“ the said Dorothy Batley by way of such annuity shall be such
“ one-third of the total income of my estate after payment of
“ income tax . . .” Having regard to the proportion borne by
the annuity of £416 to the total income of the testator’s estate
after payment of income tax, this gift of one-third of such total
income has in fact become operative.

It is, to my mind, quite plain that a gift in that form leaves
no room for the application of the principle of *In re Pettit*.¹⁶
The principle really comes to no more than this, that where a
testator leaves a beneficiary a specified annual sum free of tax,
then the testator means that the beneficiary should receive no
less and no more than that stated amount, and in order to carry
out the testator’s intention it necessarily follows that, where an
annuity is paid in such circumstances out of a fund which has
borne tax at the standard rate, the annuitant must account to
the trustees for any reliefs obtained by way of repayment of tax
calculated with reference to the annuitant’s total income, as
otherwise the annuitant will be receiving more than the stipulated
sum. But the gift made by the second branch of this bequest is
not a gift of a specified sum at all; it is a gift of a proportion,
namely, one-third, of the total income of the testator’s estate
after payment of income tax. Under a gift of that character the
beneficiary, I apprehend, receives a gift comprising one-third of
the net income of the estate plus the tax attributable to that
one-third, and it cannot be said that, if a beneficiary entitled to
such a share of income is able to recover some part of the income
tax which has been deducted in arriving at the net figure for
division, the beneficiary concerned has been overpaid. It seems
to me that under a gift in that form the question of overpayment
(which is the whole basis of the *In re Pettit* ¹⁶ principle) cannot
arise at all.

I need not elaborate the matter further. For the reasons
given by my Lord, and those I have myself expressed, I agree
that the order in this case should be varied in the way my Lord
has proposed.

HODSON L.J. I agree. Whatever may be said about the
earlier part of the provisions of this will, I think the words of
the second branch are quite clear: “ If at any time during the
“ lifetime of my wife the said Grace Lucy Batley such annuity
“ of four hundred and sixteen pounds should exceed the amount
“ of one-third of the total income of my estate after payment of

¹⁶ [1922] 2 Ch. 765.

"income tax then and in such case the amount to be paid to the said Dorothy Batley"—that is the annuitant—"by way of such annuity shall be such one-third of the total income of my estate after payment of income tax." That, I think, can only mean after payment of income tax at the standard rate.

Mr. Fletcher Cooke, on behalf of the widow of the testator, endeavoured to argue that that was merely a standard by which the annuity was to be measured; but, as I have read it, it is not merely a standard but it is a direction as to the actual annuity to be paid to the annuitant, and in those circumstances there is no room for the application of the *In re Pettit*¹⁶ doctrine. I agree, therefore, that the appeal should be allowed.

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Appeal allowed.

Solicitors: *Chalton, Hubbard & Co., for Marsh & Ferriman, Worthing; Collyer-Bristow & Co., for Birkett, Ridley & Bartley, Ipswich; Maxwell, Batley & Co.*

H. C. G.

¹⁶ [1922] 2 Ch. 765.

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July 10,
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[1951 T. 572-6.]

Landlord and Tenant—Possession—Breach of contract—Improvement—Alteration constituting trespass—Consent not unreasonably withheld—Statutory tenants—Possession refused—Terms to be comprised in deed of covenant—Action in High Court—Costs refused to plaintiffs—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 17 (2).

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The plaintiffs were the owners of a block of flats and each of the five defendants was the tenant of one of the flats under tenancy agreements for three years ending Christmas, 1950. Each agreement provided that the landlords should not be liable to provide any services and by clause 4 that the tenant would not without the landlords' written consent make any alteration to the premises or erect any stove or pipes.

In 1949 the tenants had their rents reduced by the rent tribunal, and the landlords thereafter refused to continue to supply services

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(which had included provision of hot water) unless the tenants each paid an extra £60 a year. A large number of the flats had been requisitioned, and the landlords were therefore unable to supply hot water at an economic cost.

The tenants desired to instal individual water heaters, but the parties were unable to come to any agreement as to the terms on which that could be done. The tenants alleged that the installation of individual water heaters was an improvement and that if consent was not given within 14 days they would treat it as unreasonably withheld. Consent was not given. The five tenants installed the water heaters, the flues from which had to be attached to the balconies outside the flats.

After the tenancy agreements had expired the tenants stayed on, claiming to be statutory tenants. In January, 1951, the landlords brought these actions in the Chancery Division claiming (1) possession; (2) mesne profits; (3) damages for breach of contract; (4) damages in trespass:—

Held (affirming Harman J.), (1) that as no proceedings were brought against the tenants until after the tenancy agreements had expired they had become statutory tenants under the Rent Restriction Acts; (2) that the installations were a breach of covenant within the mischief of clause 4 of the tenancy agreements; (3) that the erection of the flue pipes constituted a trespass, as the balconies were not part of the demised premises, but that the damages in respect of the trespass were very small and assessed at 10s.; (4) that, in view of the inability of the landlords to provide hot water at a reasonable price, it was not reasonable to make orders for possession if sufficient protection was given to the landlords; (5) that as the proceedings ought under the Rent Restriction Acts to have been brought in the county court (apart from the claim in trespass which in view of the very small amount of damage should have been brought in the county court), there could be no order for costs in favour of the plaintiffs, having regard to section 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

A. J. Smith & Co. v. Kirby [1947] 1 All E.R. 459, *Wolfe v. Clarkson* [1950] 2 All E.R. 529 distinguished.

But *Held* (varying the order of Harman J.), that the terms imposed on the tenants for the protection of the landlords should be contained not in an agreement but in a deed of covenant entered into by each tenant.

ACTION.

These five actions, heard together, by consent, were brought by the freeholders of a block of flats, in the borough of Hammer-smith, known as Hartington Court. The five defendants were the occupiers of five of the flats, and the plaintiffs claimed possession in each action.

The block was built before the last war. It consisted of 56 flats, each provided with hot water and some degree of central

heating by a single system operated by the then landlords, who also furnished various other services, such as porters, the lighting and cleaning of the passages, the clearing of dustbins and the maintenance of a garden in the courtyard.

During the war heavy damage was done to the property and part of the building was demolished together with the boiler house which provided the heating. At the end of the war the Hammersmith Borough Council requisitioned the 33 flats which remained more or less intact. As there was no central heating system the council provided the occupiers with individual means of heating water by gas geysers in each flat. These requisitions still remained in force. After the war the demolished portion of the building was rebuilt, under a cost of works payment, in 1946 or 1947. The property was then in the hands of a receiver and manager appointed by a building society as debenture holders, and it was his duty to let the 22 new flats.

Under the Furnished Houses (Rent Control) Act, 1946, rent tribunals were set up having the right to review the rents in any case where a contract between lessor and lessee included payment for services in that rent. The receiver sought for a device whereby, notwithstanding that the landlords intended to provide various services, including hot water (the boiler house having been rebuilt), the contracts should be kept out of the jurisdiction of the rent tribunals. Accordingly, in the tenancy agreement in respect of each of the 22 newly built flats there was a clause providing that the landlords undertook no obligations for any services, and stating that if the landlords found it convenient to furnish any services that should be done merely as an act of grace on their part. The agreements were for a term of three years ending Christmas, 1950. Each contained the following covenant: "4. The tenant agrees that he . . . will not without written consent of the landlord make any alteration in or addition to the said premises whatsoever nor erect any stove or pipe or do anything to increase the rate of premium of insurance."

The persons who entered into those agreements in every case assigned the flats to persons who were greatly in need of a home, and who were willing to accept any terms in order to get one. The five defendants were in that position. The plaintiffs acquired the freehold from the receiver in 1948. They were aware of the terms of the tenancy agreements, all of which were then current and were at rents which were only justifiable if the services, which were then being provided, were maintained.

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The Landlord and Tenant (Rent Control) Act, 1949, brought these flats under the jurisdiction of the rent tribunals, and in the autumn of 1949 17 of the 22 tenants applied to the tribunal to have their rents reduced. The landlords did not withdraw the services which they were voluntarily providing, but went before the tribunal which, on March 23, 1950, reduced all the rents on the basis that the landlords were under no contractual obligation to provide any services at all. Immediately after the tribunal's decision there was a meeting between the landlords and their solicitors and certain of the tenants who called themselves a tenants' committee. The landlords put forward proposals for the continuance of the various services, notably the hot water and the radiator heating, and produced figures purporting to show that the cost of doing so amounted to £80 or more for each of the 22 flats. By reason of the requisition of 33 of the flats, for which services were neither accepted nor paid, the whole economy of the block was thrown out of gear, and the cost to the landlords of supplying even hot water and radiator heating to 22 tenants was out of all proportion to what was reasonable.

At the meeting on March 23, 1950, the landlords had offered to provide the services for £60 a flat, and that offer was rejected by the so-called committee. As a result, on March 30, 1950, the boilers were put out and provision of hot water ceased. It had been pointed out at the meeting that under the terms of the agreements, according to the landlords' view, the installation of individual hot-water systems would constitute alterations which could not be made without their leave. They said that they would not unreasonably withhold permission, but that they must have from each tenant full details of any proposed alterations before work was started. On March 27, 1950, a letter to that effect was sent to every tenant.

The course of events thereafter differed slightly in the case of each tenant. On April 12, 1950, Mr. Jones, one of the defending tenants, applied for permission to instal a gas geyser similar to those in the requisitioned flats. He also promised to restore the property when the installation was removed. Similar applications were made by other tenants. On April 14, 1950, a further circular was sent by the landlords to every tenant offering to supply the services for £50 a flat, and stating that alterations necessary to instal individual water heating would be authorized subject to a condition of reinstatement and to a sufficient deposit to ensure the cost of it. The landlords also asked for a specification of the work proposed and an undertaking to pay their costs.

On May 18, 1950, the landlords withdrew their offer and sent out another circular in which the relevant covenant in the lease was set out. That circular was accompanied by a form of application, on the signature of which the landlords insisted before the alterations could be allowed; they also stipulated that a sufficient majority of the tenants should apply.

In June, 1950, Mr. Jones consulted solicitors on his own behalf and on behalf of 10 other tenants, including his co-defendants. On June 9, 1950, that firm wrote the following letter: "Dear Sirs, Hartington Court. We are acting for Mr. G. W. Jones and for 10 other tenants of Hartington Court in connexion with negotiations which have taken place arising out of the provision of services to the flats and particularly over the supply of hot water. Our clients now desire to instal gas or electric water heaters of approved design, full details of which we are prepared to furnish, together with proper specifications covering the work involved. We are also prepared to pay your legal expenses properly incurred in respect of the necessary licences or consents, plus reasonable damages (if any) for the diminution in the value of the premises and to give an undertaking to reinstate on departure. If this proposal is unacceptable to you, our clients intend to pursue the matter further, and to take advantage of such legal remedies as may be open to them. In the circumstances we would appreciate a statement of your clients' present attitude on this question."

The landlords' solicitors replied that the landlords were willing to give their consent in the terms of the circular letter of May 18 and the application form accompanying it. After a delay of two months by the tenants, a letter was written on behalf of Mr. Jones on August 25, 1950, in which the proposed installation was treated as an improvement (although as being possibly an alteration as well) and asking for a licence on that footing. An answer to that letter was required within 14 days, and it was intimated that at the end of the 14 days Mr. Jones would treat consent as unreasonably withheld and proceed with his alterations. He did not in fact wait for 14 days, but on September 7, 1950, placed an order for a gas heater, the work on which was started on September 12, 1950. The fumes from the gas heater were carried out by a flue pipe which was fixed to the underside of the balcony of the storey above, and ending in a baffle which protruded beyond the balcony.

The other four tenants wrote letters somewhat similar to that written by the solicitors for Mr. Jones on August 25, 1950. In

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each case they followed it up at a less or a greater interval by ordering similar installations to be made. All of them were in fact complete by October 21, 1950. Towards the end of October the landlords caused an inspection to be made of the property which disclosed the facts, and on November 16, 1950, they wrote to the solicitors acting for Mr. Jones and complained that no permission had been given. Nevertheless the landlords enclosed a fresh form of agreement on signature of which they were prepared to waive the breaches alleged; the tenants declined.

When the heaters were installed in September or October, 1950, the tenancy agreements were due to expire at the end of the quarter, although that was ignored on both sides. The rateable value of each flat brought it within the Rent and Mortgage Interest Restrictions Act, 1939.

The plaintiffs brought all five actions in January, 1951, claiming possession of the flats, mesne profits and damages for breach of contract and trespass.

Alan Campbell for the plaintiffs. The following questions are in issue: (1) Whether there was a breach of covenant; (2) whether there was an improvement under the Landlord and Tenant Act, 1927; (3) whether consent under the Act was unreasonably withheld; and (4) whether there was a trespass by the defendants.

On the facts it is submitted that there was a breach of covenant, and that there was no improvement. Consent was not unreasonably withheld; the landlords were not given a reasonable time in which to consider the application to instal the heaters. It was a matter affecting the condition of the property and its aesthetic aspect so far, in each case, as the pipes projected on to the balcony which was not part of the demise. There is no onus on a landlord to consent to an act of trespass. In all the circumstances it was not unreasonable to withhold consent; the £3 offered for compensation was quite inadequate.

The defendants are not entitled to the protection of the Rent Restriction Acts; a tenant cannot elect to neglect the burden of the tenancy and take the benefit. At common law a person could not stay on in breach of covenant, and the Rent Acts contain no warrant for that and they do not alter that part of the law. [He referred to Megarry on the Rent Acts, 6th ed., p. 180.]

*Lambert v. Woolworth*¹ is authority for the meaning of the word "improvement" in section 19 (2) of the Landlord and

¹ [1938] Ch. 883, 898.

Tenant Act, 1927. The matter has to be looked at from the point of view of the demised premises.² If the court is satisfied that these erections constitute an hideous degradation of the premises from the aesthetic point of view, refusal by the landlords would not be unreasonable³: see also *Balls Bros. Ltd. v. Sinclair*⁴ and *Premier Confectionery (London) Co. Ltd. v. London Commercial Sale Rooms Ltd.*⁵

It would not be accurate to say that this is an improvement merely because a flat with hot water is better than a flat without hot water, since a system for the supply of hot water already existed.

The balconies are not part of the demised premises; therefore the pipes and baffles which have been fixed to them constitute a trespass: see *Lawrence v. Obee*.⁶

The letter of November 16, 1950, although not designed to be a notice under the Law of Property Act, 1925, requiring the tenants to remedy the breach, was effective for that purpose. There is no prescribed form of notice, and the letter does everything required by the Act. The tenants did nothing to remedy the breach and they are accordingly in jeopardy of forfeiture. They are not, in the circumstances, entitled to relief against forfeiture: see *Hyman v. Rose*.⁷

The Rent Restriction Acts do not provide protection for the defendants' breach; in fact they are to the opposite effect. [He referred to section 15 (1) of the Act of 1920, section 3 of the Act of 1933, and to *Remon v. City of London Real Property Co. Ltd.*⁸ and *Bell London and Provincial Properties Ltd. v. Reuben*.⁹

L. A. Blundell for the defendants. The issues are: (1) Whether the defendants are properly constituted statutory tenants; if they were not, all possible grounds of defence would fail; (2) was there a breach of covenant of the expired tenancy agreement? (3) were these installations improvements within the Landlord and Tenant Act, 1927, and, if so, was consent unreasonably withheld? (4) whether the defendants committed a trespass, which depends on the true area of the demised premises; and (5) whether in all the circumstances it is reasonable that an order for possession be made.

It is submitted that each of the defendants is a statutory tenant. It is admitted that an order for possession can be made

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² [1938] Ch. 883, 904.

³ *Ibid.* 907.

⁴ [1931] 2 Ch. 325.

⁵ [1933] Ch. 904.

⁶ (1815) 1 Stark. 22.

⁷ [1912] A.C. 623.

⁸ [1921] 1 K.B. 49.

⁹ [1947] K.B. 157.

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if they have committed a breach of covenant before or after December 25, 1950: see *Bell London and Provincial Properties Ltd. v. Reuben*.⁹ No breach of this covenant was, however, committed. The covenant should be read as if it were divided into sections by the word "nor." The erection of any stove or pipe refers to things which might have the effect of increasing the rate of insurance. Whether this is an alteration is a question of degree. These installations are tenants' fixtures, and every tenant's fixture must involve some minor degree of interference, but it cannot be said that this is an "alteration" within the meaning of the covenant. The pipes were installed because the Gas Board insisted; they were merely ancillary to fitting the water heaters. The plaintiffs have throughout tended to exaggerate the amount of interference with the premises and the work involved in putting it right.

Even if the allegation of trespass be proved, that would not give the court jurisdiction to order possession under the Rent Restriction Acts. If there is no breach of covenant, there is, of course, no trespass. In fact there was no trespass, because the balconies were part of the demised premises.

Section 19 of the Landlord and Tenant Act, 1927, is not limited to negative covenants, but covers any act which would be an improvement from the tenant's point of view: *Balls Brothers Ltd. v. Sinclair*.¹⁰ What constitutes improvements was discussed in *Lambert v. Woolworth*¹¹; see also *F. W. Woolworth & Co. v. Lambert*.¹²

The installations here were an improvement and therefore within section 19. The tenants would have preferred hot water laid on, but the landlords were under no obligation to provide hot water under the lease, and therefore the water heaters were an improvement from the tenants' point of view.

A landlord's consent is unreasonably withheld for the purpose of subsection (2) of section 19 if it is merely not given; actual refusal is not necessary: see *Lewis & Allenby* (1909) *Ld. v. Pegge*¹³ and *Perls v. Saalfeld*.¹⁴ In the existing circumstances of the non-provision of hot water it was not reasonable to withhold consent. The tenants were always willing to make a deposit to cover the cost of restoration; the sum of £3 could be justified, but the defendants do not limit themselves to that amount.

⁹ [1947] K.B. 157.

¹⁰ [1931] 2 Ch. 325, 331.

¹¹ [1938] Ch. 883.

¹² [1937] Ch. 37, 48, 49, 55.

¹³ [1914] 1 Ch. 782.

¹⁴ [1892] 2 Ch. 149.

All factors must be considered on the question whether it would be reasonable to make an order for possession. The original landlords were to blame in the first instance by trying to get round the Furnished Houses Rent Control Act, 1946. The plaintiffs knew of these terms in the agreements when they bought the premises in 1948.

If the plaintiffs succeed against the defendants they are not entitled to costs. This being a case under the Rent Restriction Acts, it could have been brought in the county court or remitted there. [He referred to section 17 of the Act of 1920 and section 3 of the Act of 1933.]

Campbell in reply. The words of the covenant are quite clear. On a reasonable reading there is no doubt that there has been a breach. The alleged improvement is not limited to the premises themselves; it is ancillary to an act of trespass and cannot, therefore, be an improvement.

The defendants have not discharged the burden of proof which lies on them, to show consent was unreasonably withheld; the plaintiffs have always been ready to negotiate. There was no bona fide request for consent.

Unless a tenant is prepared to accept the burden as well as the benefit of his lease, he cannot become a statutory tenant.

It is not possible to be a statutory tenant and a trespasser at the same time. Reliance is placed on the right of forfeiture and not on the Rent Acts, and the plaintiffs are entitled to High Court costs. The court has jurisdiction to do what it pleases as to costs. By section 17 (2) of the Act of 1920 a landlord is not entitled to costs where he brings an action for possession in the High Court, but where the tenant invokes section 3 this court can impose such terms as it thinks fit.

Cur. adv. vult.

HARMAN J., in a written judgment, having stated the facts, continued:—The installation of gas water heaters did, in my opinion, clearly constitute an alteration and also constituted the erection of pipes within the mischief of clause 4 of the agreements. Thus the landlords had, subject to section 19 of the Landlord and Tenant Act, 1927, an absolute right to withhold consent, and a breach of covenant was in each case committed.

By section 19 a covenant against the making of improvements without licence must be read subject to a proviso that licence is not to be unreasonably withheld. It is settled law that this section covers a covenant against doing something which is an

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alteration, if it be in fact an improvement (*Lambert v. Woolworth*¹⁵), and that the question whether it is so must be looked at from the point of view of the tenant. That was decided by Luxmoore J. in *Balls Brothers Ltd. v. Sinclair*,¹⁶ which was approved by the Court of Appeal in *F. W. Woolworth & Co. v. Lambert*.¹⁷

Access to the flats is obtained by passages in the form of balconies running along the outside of the building. In my judgment these balconies are not included in the demise to a tenant in the tenancy agreements, but remain the property of the landlords. The fumes from the gas heaters are carried out of the flats by flue pipes fixed in each case to the underside of the balcony of the storey above and ending in an unsightly baffle protruding beyond the balcony. This appears to be an essential feature.

Were, then, these gas heaters improvements within the meaning of section 19 of the Act of 1927? On the one hand it was submitted that the flats were not intended to have their water heated in this way, but contained a built-in system of pipes for supplying hot water from a central boiler and that anything else was a mere makeshift; further, that the baffles which I have described ruined the appearance of the building. This last objection would have great force if the baffles stuck out in the front of the building, but in fact they stick out at the back, where each of the 33 requisitioned flats has a similar installation, and in those circumstances the addition of a score more seems to me not to deteriorate considerably the amenities of the place. It was argued on the other side that these installations must be improvements from the tenants' point of view because a flat with hot water must be an improvement on a flat without it. If the landlords had been in a position to offer a supply of hot water at a reasonable cost I should have been prepared to hold that these could not have been improvements, but the position is different where the landlords, for the reasons before stated, were not in a position to supply this service except at an excessive cost. Apart from this, the plaintiffs have inherited these tenancy agreements which are in such a form as to give them no right to supply and charge for any water heating. In the circumstances I should be prepared to hold that these were improvements but for one fact, and that is that each of them is not confined to the demised premises, but depends on the existence of a flue pipe

¹⁵ [1938] Ch. 883.¹⁷ [1937] Ch. 37, 49.¹⁶ [1931] 2 Ch. 325, 331.

which is fastened to, and is therefore a trespass on, the landlords' property. I do not see how anything can be an improvement to demised premises which necessarily extends beyond them and trespasses on the property of the landlords who are not obliged to afford support for these flues from their property; without them I understand the installations are not practicable.

On this footing the section does not apply. The landlords had an absolute right to withhold their consent, and each installation was a breach of covenant which remained unremedied when the tenancy agreements expired.

I must, however, further consider the matter on the footing that I am wrong in the view last taken and that these alterations do constitute improvements within the meaning of section 19 of the Act of 1927, and that, therefore, consent to them must not be unreasonably withheld. Have, then, the landlords been unreasonable? I take it that they have withheld their consent by the mere act of issuing the writs in these actions. In the first place it seems to me again important to emphasize that these were short tenancies. The landlords had no assurance that any tenant would stay beyond Christmas, 1950, and this fact, in my judgment, entitled them, if they were to assent to alterations of the property to this degree, to take every step to protect themselves against expense if and when the tenant should vacate.

The landlords, though conceiving themselves entitled to refuse their assent unconditionally, never did so, and the question which I have to decide is whether the conditions which they imposed on the giving of licences were such as they might reasonably impose in the circumstances. In my judgment, on the facts, even if the installations were improvements, the landlords have not unreasonably withheld their consent to their installation, with the result that the tenants were not justified in doing what they did and had, before the end of the contractual tenancy, in each case committed a breach of a covenant in the lease which would justify a claim to forfeiture after service of the proper notice under section 146 of the Law of Property Act, 1925. No such notices, however, were sent out and all the tenancies expired at Christmas, 1950, and it is perhaps the fundamental question in the action whether after that date the tenants held over as statutory tenants, or whether they became mere trespassers, in which case there is no answer to the landlords' claim.

In my judgment each tenant, on December 26, 1950, by holding over acquired a statutory tenancy; this, of course, is not

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a tenancy, though conveniently so called. It is a mere status of irremovability. The landlords argue that this status is not acquired by a tenant who during his contractual tenancy has committed such a breach as would entitle his landlord to forfeit the lease, but I can find no basis for this proposition, reasonable though it may sound. The landlords served no notice to remedy the breach before the expiration of the tenancies and therefore were not in a position to forfeit the leases before they expired, and I can see no reason why in those circumstances a statutory tenancy did not arise at Christmas, 1950, in favour of each defendant who held over. Whether the same would be true if notices had been served I need not decide, though I think it would. If writs for possession had been issued before Christmas, 1950, thus conditionally avoiding the leases, the position might have been different; though even so it would have been arguable that statutory tenancies arose: see the observation of Asquith L.J. in *Court v. Robinson*.¹⁸ No doubt a tenant in such a position might expect to get short shrift when the court was asked to say that it was reasonable that the landlord should not have possession, at any rate in a case where the breach was such that relief against forfeiture would not have been granted under the Law of Property Act, but the question would still, in my judgment, be whether it was reasonable to give possession within section 3 and Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

I ought here to say that I am of opinion that there is nothing in the cases of the defendants other than Jones to differentiate their cases from his from the point of view of the reasonableness or otherwise of the landlords withholding their consent.

There remains, therefore, the question whether it would be reasonable to make orders for possession, or, at least, to make it a term of withholding that order, that the offending installations should be removed. It has been said that cases where possession should be refused although the breach complained of is not remedied are rare: see *per* Morton L.J. in *Bell London and Provincial Properties Ltd. v. Reuben*.¹⁹ This, of course, I accept. None the less I am of opinion that it would not be reasonable in the circumstances to make orders for possession here, nor to insist as a condition on the removal of the heaters. I am far from condoning the actions of the defendants, who, in my view, were quite unjustified in attempting to flout their landlords and dictate

¹⁸ [1951] 2 K.B. 60, 73.

¹⁹ [1947] K.B. 157, 162.

their own terms for occupying what is, after all, the landlords' property. It remains the fact that the 33 requisitioned flats all have heating systems of this sort and that the landlords themselves have granted licences to other tenants for similar installations and were always before writ issued, willing, even after the breaches were known to them, to do the same for the defendants. The question seems to me, therefore, to be on what terms I ought to allow the tenants to remain in possession and maintain their installations. In my judgment, it should be on the terms that each of them signs a document substantially in the form of the draft agreement accompanying the landlords' letter to the solicitors of Mr. Jones of November 16, 1950. This must be agreed or settled by the judge. It should give to the landlords all the protection for which section 19 of the Act of 1927 provides, and in particular: (a) the payment of a proper sum towards the landlords' costs—this seems to have been agreed at four guineas—and (b) the deposit of a proper sum to pay for the reinstatement of each flat after removing the heaters. On the evidence this seems to be a sum of about five guineas. It seems also to be now agreed that this type of installation does not interfere with the functioning of the central system so that it should be made clear that no tenant is obliged to revert to that if the landlords agree with the other tenants, or a majority of them, to restore it. If any of the defendants fails to sign the agreement within 21 days of the date when its terms are agreed or settled an order for possession will go against him.

I am conscious that the terms which I impose do involve the continuance of the trespass committed by each tenant in causing the flue to be affixed to the landlords' property, but as I can give or withhold possession at my discretion, I conceive it to be within my jurisdiction to impose this condition on the landlords as part of the terms on which I refuse possession.

There remains the important question of costs. The actions are analogous to actions for possession by lessors against lessees where the breach is proved but the lessee obtains by counterclaim relief against forfeiture which he may have (though this is unusual) without remedying the breach: see, for example, *House Property and Investment Co. v. Walker*.²⁰ In such cases the ordinary course is to direct the tenant, as one of the terms of

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²⁰ [1948] 1 K.B. 257.

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obtaining relief, to pay the costs of action and counterclaim, and this is the course I should be disposed to take if free to do so. The present actions, until the statements of claim were amended at the hearing, were framed as though contractual tenancies existed and had been forfeit by notice under the Law of Property Act. This, of course, was a misconception, for in fact the tenancies had expired before writ and the defendants were either mere trespassers or statutory tenants. I have held them to be the latter. The actions were therefore claims for possession against statutory tenants on the ground that a breach had been committed of the contractual terms imported into each statutory tenancy by section 15 of the Rent and Mortgage Interest (Restrictions) Act, 1920, and that it was reasonable that the court should make orders for possession; and it is on that footing I have decided the cases. The claims in trespass I ignore, for they are technical.

Have I then jurisdiction to impose on the tenants, as a term of allowing them to retain possession, the obligation to pay the landlords' costs? In my judgment I am precluded from doing so by section 17 (2) of the Act of 1920, which forbids the granting to a plaintiff of High Court costs in a case "arising out of this Act." These words have been much debated, but it seems to me that the point is decided in favour of the tenants by the decisions of the Court of Appeal in *Russoff v. Lipovitch*²¹ and *Lee v. K. Carter Ltd.*²² It is true that here the landlords claimed throughout that the tenants were not protected by the Acts, but that claim I have rejected, holding that the only justification of the claims to possession lies in satisfying the conditions laid down in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933:

Accordingly I find myself precluded from awarding the landlords any costs. As to the tenants, they deserve none, in my judgment, for they could have had the terms which I have accorded to them without any action at all, and the proceedings were a result of their unreasonable attitude.

There will be orders for mesne profits; I understand that the amounts are agreed. A separate order is desirable in each action.

I. G. R. M.

The plaintiffs appealed.

²¹ [1925] 1 K.B. 628.

²² [1949] 1 K.B. 85.

Heathcote-Williams Q.C. and *A. Campbell* for the landlords.
Lionel A. Blundell, John Plume and *Stanley Ibbotson* for the
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The agreement intended to carry out the judge's order had
 been prepared but by reason of the appeal not settled.

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EVERSHED M.R. [after stating the facts and that for the
 purposes of the appeals one case only would be dealt with, namely,
 flat 25 and the defendant Wellwood:] I now turn to the pro-
 ceedings themselves. They were instituted, not in the county
 court but in the Chancery Division of the High Court, and the
 pleadings are somewhat elaborate although the claim made is
 simple enough. The prayer of the statement of claim is as
 follows: "The plaintiffs' claim is for (1) possession of" the
 premises; "(2) mesne profits; (3) damages for breach of
 "contract; (4) damages in trespass."

It is to be noted that no figure was stated as the quantum of
 damage suffered or claimed under paragraphs 3 and 4 of the
 prayer. As regards the damages in trespass, the trespass alleged
 consisted of the fact that the flue pipes were attached by rods or
 brackets to the underside of the balconies, and the claim was
 (and it was a claim which the judge held to be well founded)
 that the balconies formed no part of the flats demised, but were
 the property of the landlords. The joinder in one action of the
 claims for possession, rent, etc., on the one hand, and the claim
 for damages for trespass on the other, was, I think, strictly
 speaking, not authorized save by consent, but no objection, in
 fact, was ever taken to that joinder, and no doubt that was wise
 enough since the whole matter turns on the consideration of a
 single series of facts.

I propose, first, to deal with a point that has been taken and
 which depends upon the circumstance that this action was
 started, as I have explained, in the Chancery Division of the
 High Court and not in the county court. In the course of his
 judgment the learned judge expressed the view (and I am
 content to treat it as entirely correct) that the tenants, during
 the course of this protracted series of battles, were unreasonable,
 among other matters, when they declined to agree with certain
 suggestions put forward by the landlords in May, 1948, for
 authorizing, on terms, the continuance (at any rate for a limited
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of separate hot water to the flats by means of these pipes attached to the balconies. Indeed, at the end of the learned judge's judgment I find this language: "As to the tenants, they "deserve none"—that is, no costs—"in my judgment, for they "could have had the terms which I have accorded to them without any action at all, and the proceedings were a result of their "unreasonable attitude." But the judge came to the conclusion that by virtue of section 17 (2) of the Rent Restriction Act of 1920 he was precluded, either directly or indirectly, from awarding to the plaintiffs any costs whatever. That is one of the matters which has been the subject of complaint in this court by the appellants, and since it has, I think, somewhat far-reaching effects when I come to consider the order made or to be made in this case, I propose immediately to deal with that aspect of the case. Section 17 (2) of the Rent Restriction Act, 1920, is in the following terms: "A county court shall have jurisdiction to deal "with any claim or other proceedings arising out of this Act or "any of the provisions thereof, notwithstanding that by reason "of the amount of claim or otherwise the case would not but for "this provision be within the jurisdiction of a county court, and, "if a person takes proceedings under this Act in the High Court "which he could have taken in the county court, he shall not be "entitled to recover any costs."

It was the learned judge's view that the whole of these proceedings were fairly to be described as proceedings taken "under "this Act," and were proceedings which, accordingly, could have been taken in the county court. For that reason the learned judge thought that the final line of the subsection prevented him from awarding to the landlords any costs whatever; and the first question is whether that view is right. I think the matter is one of some little difficulty, and, although it has been considered on two or three occasions by the courts, I confess that for my part I am not satisfied that any satisfactory answer to the question, what is the exact scope and meaning of this subsection, has yet been given.

The first thing to note about this case is that although the first three paragraphs of the prayer seem, with reasonable clearness, to comprehend, or to be, claims "arising under the Act," that is, of course, not true of the claim for trespass. In saying that the first three claims are properly described as "claims "arising under this Act," I do not forget that, as the proceedings were initiated, the form which they took was that the plaintiffs

said, "Here is a contractual lease the provisions of which have been broken; we, the landlords, have forfeited the lease. We claim possession as upon a forfeiture, and claim also damages for breach of the contract contained in the lease." But once it was made apparent by the terms of the defence that the claim that the defendant would set up, and seek to rely on, was that he was within the protection of the Rent Acts; and certainly once it was made clear (as it was by the learned judge), that there had been no forfeiture of the lease, but that the lease had expired and accordingly that the tenant was in possession, or in occupation, either as a trespasser or, by virtue of section 12 of the Rent Restriction Act of 1920, as what is called a statutory tenant; and, further, when it is appreciated that the breach of covenant is a continuing breach; then I think it becomes plain, and I do not think Mr. Heathcote-Williams or Mr. Campbell have really seriously contended to the contrary, that all these claims arising out of the alleged breach of covenant and consisting primarily of a claim for possession, must be regarded as arising out of or under the Rent Act. If, therefore, there had been no other claim added, it must, I think, be obvious that the county court had jurisdiction to deal with them. I quite agree that the present matter is in some respects complicated, but still it has been quite plainly the policy of Parliament that all these Rent Act cases should be dealt with in the county court. It is not part of the duty of the court to criticize the policy of Parliament, and I am not so doing; indeed, I add that, according to my experience, the county courts have shown themselves very well qualified to deal, as they have done over a long period of years (and they have gained a considerable experience in so doing), with all the problems to which the rent legislation has given rise. But that is not an end of the matter in the present case, for there is here added the claim for trespass, and that is something quite distinct from anything which is comprehended in the Rent Acts. The matter would be just the same, to take an example given in the course of the argument, if, in a case of this kind, physical violence had occurred and a landlord had claimed for some physical injury done in a free fight.

The next thing to observe is that the claim in respect of trespass, the claim for damages, is not, as I have already said, quantified, and that makes it desirable to refer at once to the section dealing with the jurisdiction of the county court in matters of tort, namely, section 40 (1), which is in the following terms:

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“ A county court shall have jurisdiction to hear and determine
“ any action founded on . . . tort where the . . . damage claimed
“ is not more than two hundred pounds. . . .” As a matter of
practice, it appears to be well established that in actions of tort
in the county court a limit is placed in the plaint itself on the
amount of damage so as to make clear that the claim is within
the county court jurisdiction. A plaintiff is always entitled to
put that limitation on his claim. If, in fact, he has suffered (say)
in a personal injuries action more than £200 damages, he may
abandon any claim to any excess, and sue in the county court for
damages not exceeding that figure; but the first question is, is it
necessary, in order to found jurisdiction, that there should be a
statement in the plaint limiting the claim for damages to that
extent?

That question came before this court in *Legon v. Count*.²³
In that case there had been no limit placed in the plaint
on the damage claimed, but objection having been taken by
the judge himself to the jurisdiction of the court, the plaintiff
sought to amend his claim by imposing such a limit, and the
county court judge held that he had no jurisdiction in the matter
at all and could not, therefore, sanction any amendment. This
court took a different view and held that the court had power,
under Ord. 15, r. 6 of the County Court Rules, to amend the
plaint so as to impose the necessary limit on the claim. I am
left in a little doubt how far the decision in that case logically
goes. It was Mr. Blundell's argument that it logically goes this
length, that if the county court judge had jurisdiction to amend
the claim by inserting a limit as to damage, then, so long as no
more than the requisite sum of damages was claimed or recovered
at the trial, it must follow that the county court had jurisdiction
to try the case, even though at the trial there was still no limit
stated as to the damage. If that were so, then, said Mr. Blundell,
any argument which is based in this case on the incompetence of
the county court, because the sum of damages for trespass was
unstated, is disposed of in limine. I think it unnecessary to
express a view on that matter, and, as I shall later repeat, having
considered the cases which have been cited, I think the whole of
this rather difficult question of the exact effect of section 40 of the
County Courts Act and of the precise construction of section 17 (2)
may some day have to be considered in this court—and I think
it is open to the court to consider it. In the present case I think

²³ [1945] K.B. 391.

that this point can be disposed of on the special facts of the case itself, the point being (in case I have not made it clear) that the learned judge was wrong in his conclusion on the effect of section 17 (2), because the proceedings were not exclusively proceedings under the Rent Acts, but included a claim for damages for trespass, which latter claim was, by reason of the absence of any limit stated, outside the jurisdiction of the county court.

So that I may give at once the answer which I think should be given to that argument, I think, having regard to the facts in this case as they became apparent on the pleadings (and certainly as they became apparent at the trial) that the claim for damages for trespass must be regarded, and can only be regarded, as having always been a very minor characteristic of the proceedings, a claim in respect of which the damages could not by any possibility have amounted to any figure approximating to £200. As I have already said, the only trespass alleged consisted of the fact that in each case a pipe had protruded through the window and was held in position by a bracket or two rods affixed to the underside of the balcony. It is true that Mr. Campbell has said that the effect of these actions on behalf of the tenants was greatly to diminish the value of the flats by destroying, or diminishing, their aesthetic value; but as I have already ventured to say, I think that is an altogether extravagant suggestion. The sum of 10s. awarded by the judge in respect of this damage for trespass is, to my mind, ample recompense for any injury suffered on this account by the plaintiffs. I add also that when before the trial an application was made by the defendants to have the proceedings transferred to the county court, no point appears to have been taken by the plaintiffs that the case was in any event (by reason of the unquantified claim for damages for trespass or otherwise) outside the county court jurisdiction.

It therefore follows that in this case there have been joined two causes of action (and, if improperly joined according to the rules, there has been no objection taken to the joinder), namely, proceedings under the Rent Acts for possession and ancillary relief (which clearly, by the terms of section 17 (2), would, as such, be within the competence of the county court) and also an independent claim for damages for trespass being a claim which, as was made apparent in the pleadings, and which was made more apparent at the trial, was of an altogether trivial character, and such, as it is clear, would of itself have been also within the jurisdiction of the county court. Not only that, but according to

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section 47 of the County Courts Act it was a claim which (apart from any point under subsection (3)) in the event disentitled the plaintiffs to recover any costs in respect of it at all. I therefore take the view that on the facts in this case, whether the matter is regarded as a whole or whether regard is had to the two aspects of the claim, namely, the Rent Acts claim and the trespass claim, the judge rightly concluded that no costs could be awarded to the plaintiffs, either directly or indirectly, in respect of their claims.

But it will, I think, be useful if I say a little more on this topic because of the authorities which have been cited, of which I propose to refer to two only. The first is *A. J. Smith & Co. v. Kirby*²⁴ (hereafter referred to as *Smith v. Kirby*), a case which came before Hilbery J. That was an action brought by landlords claiming, first, arrears of rent under a lease, and, second, to recover possession of premises, which premises were comprehended within the scope of the Rent Acts. The action having been brought in the High Court, the question arose whether the plaintiffs, being entitled to judgment, could recover costs, having regard to section 17 (2) of the Act of 1920. From what is pointed out in a later case (to which I shall come) by Tucker L.J., it appears that the lease in question was a lease for 21 years, which had been granted in the year 1928. It seems clear, therefore, that the claim for unpaid rent was a claim solely in respect of the contractual obligation to pay rent as distinct from a claim which might have arisen against a statutory tenant, so called, for failure to pay the equivalent of rent which he is bound to pay by virtue of section 15 of the Act of 1920. Having regard to the circumstance that the lease was for 21 years and was granted in 1928, the claim of the plaintiffs must also have been founded on a forfeiture, since the case was tried in 1947, only 19 years after the grant of the lease. However that may be, Hilbery J. said, rejecting the argument that the case could have been brought in the county court: "It arose out of the lease, and could never have been brought in the county court because it was outside the amount which is the limit of the jurisdiction of the county court. The claim for possession was a claim which the county court could have entertained, and which the county court alone should have entertained if it had stood alone, but the action was for arrears of rent and, in the second place, for possession, and, although the premises are within the Act, and, therefore, the claim in respect of the possession arises out of the Act, yet,

²⁴ [1947] 1 All E.R. 459.

“ as the claim for the rent arises out of the lease, the whole action
 “ is not one to which section 17 (2) applies. That subsection
 “ applies to a claim or proceeding arising out of the Act and
 “ provides that the county court shall have jurisdiction to deal
 “ with such a claim. It is true that the subsection gives the
 “ county court jurisdiction to deal with such a claim, notwith-
 “ standing that, by reason of the amount of the claim or otherwise,
 “ the county court would not otherwise have jurisdiction. It is
 “ the amount of the claim arising out of the Act which, if in
 “ excess of the county court jurisdiction, is not to prevent the
 “ county court having jurisdiction. That subsection deals with
 “ a case where the whole claim arises out of the Act.” So it
 was argued here that, since the claim for trespass did not arise
 out of the Act, section 17 (2) did not apply. In my judgment
 the present case, since the claim for trespass was also within the
 county court jurisdiction, is in any case distinguishable on that
 account from *Smith v. Kirby*.²⁴

But I will pass at once to the second case, to which I have
 already made some allusion by anticipation, the case of *Wolfe*
v. Clarkson ²⁵ in this court, in which the first case was considered.
 That was also a claim for possession of premises with an added
 claim for a sum of money for damages for breach of covenant to
 repair, and it was said, on the authority of *Smith v. Kirby*,²⁶
 that the two things were distinct; a claim for damages for failure
 to repair was a claim arising under the contract, and therefore,
 following *Smith v. Kirby*,²⁶ was not one arising under the Rent
 Acts and, having regard to the amount claimed, was not otherwise
 one with which the county court judge could deal. The answer
 of this court in *Wolfe v. Clarkson* ²⁷ was that since the breach
 was a continuing breach, and since before the action started the
 contractual tenancy had determined, therefore both the claim for
 possession and the claim for breach of covenant to repair could
 be said to arise under the Rent Acts, for the plaintiff could found
 his claim for damages exclusively on the period after expiry of
 the contract, when the tenant was a statutory tenant only. But,
 in the course of his leading judgment in that case, Cohen L.J.
 referred in these terms to the case of *Smith v. Kirby*.²⁸ The
 learned judge cited the passage which I have already cited and
 went on to say ²⁹: “ That case, I think, amounts to a decision
 “ that, if any part of the claim is one which could not be within

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²⁴ [1947] 1 All E.R. 459.²⁷ [1950] 2 All E.R. 529.²⁵ [1950] 2 All E.R. 529.²⁸ [1947] 1 All E.R. 459.²⁶ [1947] 1 All E.R. 459.²⁹ [1950] 2 All E.R. 532.

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“ the jurisdiction of the county court, the fact that another part
 “ could have been brought in the county court instead of in the
 “ High Court does not prevent the court awarding costs in respect
 “ of the whole proceeding. That conclusion derives some support
 “ from the contrast between the early words of section 17 (2),
 “ which deals with jurisdiction and enables the county court to
 “ deal with ‘ any claim or other proceedings,’ and the words in
 “ the last part which merely prohibit the awarding of costs if
 “ proceedings are taken in the High Court (which, I think, means
 “ the whole proceedings) which could have been taken in the
 “ county court. Therefore, with that part of the decision, I do
 “ not see any reason to quarrel.” I have added, by way of
 brackets, what I think is the essential punctuation to the sentence
 which I have read. The learned Lord Justice then proceeds to
 say that as regards the rest of *Smith v. Kirby*,³⁰ namely, whether
 it was rightly decided on its own facts, he expressed no view; and
 Tucker L.J., in his shorter following judgment, confined himself
 to saying, as regards *Smith v. Kirby*,³⁰ that he expressed no view
 about it and was not to be taken to be suggesting that it was
 wrongly decided. The first part of the passage which I have
 read from Cohen L.J.’s judgment lends, I think, support to the
 conclusion which I have already stated; for in the present case
 all the claims were within the county court jurisdiction. But
 with the utmost respect to him I am not, as at present advised,
 satisfied that I agree with Cohen L.J. when he says, at the end
 of the passage which I read, that the second part of subsection (2)
 of section 17 means, and could only mean, cases in which the
 whole proceedings could have been taken in the county court, if
 he intended thereby to say that section 17 (2) has no application
 (quoad Rent Act claims) where those claims are joined with
 another claim which itself is outside the county court jurisdiction.
 It is to be noted that he omits certain important words which
 appear in the later part of the subsection; the phrase is “ and if
 “ a person takes proceedings *under this Act* in the High Court
 “ which he could have taken in the county court he shall not be
 “ entitled to recover any costs.” The wording of the subsection
 is not entirely happy nor its conception entirely clear to my mind.
 For it is plain that all proceedings “ under this Act ” must be
 within the jurisdiction of the county court; it is not possible to
 contemplate any proceedings “ under this Act ” part of which
 were outside the jurisdiction of the county court.

³⁰ [1947] 1 All E.R. 459.

What I think then is difficult is the case where there is a proceeding "under this Act" joined with some proceeding not under this Act, the latter being of itself outside the jurisdiction of the county court. What should the plaintiff do? Should he bring two proceedings, one in the county court and one in the High Court? If he brings both proceedings together in the High Court, then, as things stand at present, he may rely on *Smith v. Kirby*³⁰ as authority for the view that he is entitled to costs in the ordinary way, section 17 (2) being excluded. But I am not, as at present advised, entirely satisfied as to the correctness of the decision of *Smith v. Kirby*,³⁰ or of the affirmation of it as it was expressed by Cohen L.J. in the passage which I have read. I think the matter is open for consideration and decision in this court. I say no more in the present case, since, for reasons which I have already given, where there is joined with a proceeding under the Rent Acts another proceeding or claim which is itself within the county court jurisdiction, I am, for my part, satisfied that section 17 (2) is not excluded so far, of course, as it is relevant, namely, so far as it relates to the proceeding under the Rent Acts.

That part of my judgment disposes, rather out of turn, of the argument of the plaintiffs criticizing the judgment for the failure to award to them below any costs, either directly or as a condition of the defendants remaining in possession; but I have dealt with it at this stage for this reason: there has been criticism, on the plaintiffs' side, of the form of the order in this case, to which I am about to turn. And it is a form of order which I should not in general, if I may say so without disrespect to the judge, be prepared to approve. Putting it quite briefly, what the judge has done is to state in his order that he does not grant possession to the landlords, but makes that order subject to the condition that the tenants, first of all, enter into certain obligations; and then he goes on to state that, if they do not do so within a limited time, an order for possession will go. In general I think a more satisfactory form of order, where the judge takes the view that the tenant should be entitled to remain in possession subject to conditions, is to make an order for possession and suspend it provided that the conditions of the order continue to be satisfied. In saying that I am, indeed, echoing the language of Morton L.J. in *Bell London and Provincial Properties Ltd. v. Reuben*.³¹ That was a case which attracted some little

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³⁰ [1947] 1 All E.R. 459.³¹ [1947] K.B. 157.

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notice, because of its unusual character. The lady in that case, contrary to the terms of her tenancy, insisted on keeping a dog in her flat on the ground that the presence of the dog was a necessary comfort to her nerves, and as she kept the dog in breach of her covenant, and quite clearly intimated that she proposed to continue to do so, the landlords served a notice to quit and then brought an action for possession in the county court founded on the breach of covenant. The county court judge declined to grant possession and dismissed the proceedings. He added: "I do not say anything about any possible future breach." It was objected that that form of order sanctioned by necessary inference a continued and indefinite breach of the covenant. Therefore Morton L.J. said ³²: "I think, possibly, if I had been trying the case, I might have inserted some safeguard for the assistance of the landlords; for example (though I have not thought out the exact form of words) I might have ordered that possession should be given but that the order should not take effect so long as the lady satisfied the landlords, perhaps monthly or every two months, by some medical certificate, that her health still required the presence of the dog."

In cases of this kind, I also think it is more desirable, as a rule, to make an order for possession and suspend it on certain terms than to follow the converse course adopted in this case; particularly where, as here, so long as the tenants continue in possession in accordance with the scheme which has appealed to the judge, they will not only be in continuous breach of the covenants derived from the leases, but will also be continuing a trespass by the bracket on the underneath part of the balcony. But whatever may be the best general practice to apply in this case I think that the matters to which I have already alluded make it highly undesirable that a form of order should be selected which would perpetuate these proceedings in the High Court. If the order is in the form for which Morton L.J. indicated a preference, then, if there were any question whether the conditions continued to be satisfied, an application would have to be made to the Chancery Court for the purpose of determining what further order should be made; and for reasons which I have already indicated, it seems to me that, if any such further application were made to the High Court, however well justified the landlords might be upon that occasion, the result would be that the landlords could never recover any costs. And

³² [1947] K.B. 157, 164.

that seems to me to be wrong and unfair to the landlords. Therefore, in this case, subject to what I shall presently say, I do not think that there is any good reason for altering the form of order which the judge made.

But I should first state more precisely what was the order made, and I read it accordingly: "This court doth order that "upon the execution by the defendant of an agreement in terms "to be agreed between the parties or in the alternative to be "settled by the judge within 21 days of the date when its terms "are agreed or settled by the judge and upon the deposit and "payment within the time aforesaid of such sums as by the "terms of the said agreement are to be deposited or paid by the "defendant this court doth not think fit to make an order for "possession but in default of such execution deposit and payment "it is ordered that the plaintiffs do recover from the defendant "possession of the property known as," and the flat is identified; "and it is ordered that the plaintiffs do recover from the defendant "a certain sum for mesne profits, and the sum of 10s. for damages for trespass.

The complaints made against that form of order are, first, that which I have already indicated, namely that by inference the judge has authorized, indeed imposed on, the landlords a continuing breach of covenant and a continuing trespass; and I agree that, where a judge thinks it unreasonable to make an order on some condition or another, it would not be, in general, right that those conditions should involve the committal of some independent wrong. But, in the present case, it is quite plain from what I have said that the trespass itself is of a most trifling and unsubstantial character; furthermore, the breach of covenant must be regarded in the light of the fact that these premises were obviously built and adapted for the central supply of heat and hot water. No one can possibly have supposed that the covenant, which I have read, was ever intended to operate in the circumstances in which, unless it were broken, the tenants would have no heating and no hot water whatever. Indeed, the actual work done, as the judge held, would, apart from the trespass, have been an improvement and one to which the landlords could not reasonably have refused their consent. The case is, therefore, a very special case and the inferences which may be said to flow from the order, namely, that they contemplate the continuance of some wrongful act, are inferences which are not of any real moment in the present case. And I have, myself,

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no doubt that the solution which appealed to the learned judge is the correct and sensible solution. It is beyond reasonable contemplation that this long protracted warfare should go on; that the tenant should be prevented from having hot water, except such moderate supply as can be derived from boiling it in a kettle. And the finding of the judge that the offer made in May, 1948, is one which the tenants were unreasonable in refusing involves also the fact that the landlords were, subject to the terms of that offer, quite content with the breaches of covenant and the trespass which are the subject of the present debate.

The agreement, which is referred to in the order, was the document which was put to the tenants for the execution at the time of the negotiations in May, 1948, and with which the landlords continued to be content until shortly before the proceedings started. The terms of it are referred to by the judge, and I need not take time by reading the whole document. The short effect of it is that the tenant is to do the work in a proper way; is to make certain payments, the amount of which does not seem to be in dispute, to maintain the apparatus properly and, on the happening of certain events, to remove it. At the time that the agreement was put forward, it was thought that these stoves and pipes and the like would physically interfere with the general hot water system, if and when it was installed, and therefore there was included paragraph (e): "If the landlord arranges for 'a central hot water supply to be made available to more than 'half of the flats at Hartington Court or to more than half of 'the 22 flats now let by the landlord and the tenant's installation 'would otherwise interfere with this the tenant will disconnect 'the tenant's installation on being given not less than three 'months' notice in writing. . . ." It now appears to be clear that these stoves will not, in fact, interfere with the central hot water supply in the sense of physically interfering with it at all, and, therefore, this paragraph (e) loses its significance. It was suggested that something else might be substituted for it, but I have come to the conclusion that it would be unwise and, indeed, wrong to attempt any such alternative provision.

One of the objections made by the landlords to this form of order was that it seemed to be imposing on them the duty of having to enter into some agreement imposing on themselves some conditions as a term of permitting the tenants to remain in possession. That effect, I think, was produced, first, by the

use of the word "agreement" in the order, and, second, by what I take to be a slip in the sentence in the judge's judgment³³: "I conceive it to be within my jurisdiction to impose "this condition on the *landlords* as part of the terms on which "I refuse possession." I think the judge meant "tenants" by "landlords" in that sentence I have just read; at any rate, I think that it would not be right to impose terms on the landlords to try to compel them to enter into some agreement.

In the circumstances I think that the proper course is to omit paragraph (e) from this document. Further, I think it is incorrect and misleading for the order to refer to the document as an "agreement," because that *prima facie* means a contract between two parties. I think the form that this document should take is a deed of covenant and that the tenants should, as a term of their continued possession, execute a deed of covenant in the terms specified, but with the exclusion of paragraph (e), and that the order should be varied to that extent.

One other thing must be made quite clear. By making it part of the order that the tenant shall enter into a deed of covenant in that form, it is not to be taken that the landlords are thereby assenting to, or waiving the trespass. In the existing circumstances no court would grant an injunction against a continuation of the trespass. But it should be clearly understood that it is open to the landlords, if they desire to do so, to proceed for damages for trespass so long as this stove arrangement continues. I hope very much they will not think it a good idea to do so, because the damages, as has already been made apparent, are nominal; but it is, I think, necessary to say what I have said so as to make clear the point that this form of order is not by its very terms to be taken as sanctioning, or condoning, or forcing the landlords to sanction or condone, the committing of an act of trespass. For the reasons, therefore, which I have indicated, the order should be slightly varied, but subject thereto it should stand as it is. Let me say at once that, if there was some change in the circumstances or breach by the tenant of his deed of covenant, or, if the landlords were ready to put into operation a central scheme of heating for all the flats, then it would be open to the landlords, notwithstanding anything in this order, to make an application to the county court (not the High Court) for possession. This application would be based on the ground that it is no longer reasonable for these tenants to

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³³ Ante, 803.

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continue in possession in breach of the terms which the original contract imposed on them; and it would then be open to the county court to consider whether on terms (which may well be quite different from those now imposed) any further permission to remain in possession should be given to the tenants. And by thus emphasizing that future proceedings should be in the county court I shall at least be saving both parties a great deal of expense; but I hope, indeed, that after this long consideration in two courts, each party will see the advantage of living in amity with the other.

That covers the main substance of this case, but there is one other point to which I must refer. Mr. Campbell said that in any case the present tenant was outside the ambit of, and could not claim in any event the benefit of, the Rent Acts, and therefore, since his tenancy had expired, must be ordered forthwith to give up possession. That argument was based on the suggestion that this man, Wellwood, had been shown to have been in breach of clause 4 of his contract, and was shown also to be intending to continue that breach and accordingly was disentitled to claim the protection of the Acts. So stated, the proposition is at least intelligible. It is true that by his defence the tenant was alleging that he was not in breach of covenant, but the court found that he was, and it is, I think, a correct inference in the circumstances that he intended to continue to do the thing which was held to be a breach of covenant. But Mr. Campbell then went further. The judge used, in the course of his judgment, the word "flout" as applicable to the conduct of the tenant; he was "flouting" his landlords; and Mr. Campbell said that the tenant was intending to "dictate terms" to the landlord. Mr. Campbell then formulated his argument thus: If the tenant knows that he is breaking his covenant and intends to go on breaking it and to dictate his own terms and flout the landlords and the landlords make it plain that they will not accept the terms which the tenant seeks to dictate, then the tenant does not get the benefit of the Rent Acts. I am bound to say that, although the first statement of the proposition was intelligible, the latter expansion is, to my mind, not intelligible. When language such as "flouting" and "dictating terms" is introduced, then we seem to pass from the precise language which the lawyer understands to the imprecise language of moral condemnation, or even abuse, and I can find nothing in the Rent Acts which introduces any such consideration as a basis for their

application. No doubt all these matters are relevant on reasonableness; but on the argument as earlier formulated, I can add nothing to what the learned judge said³⁴: "The landlords argue that this status is not acquired by a tenant who during his contractual tenancy has committed such a breach as would entitle his landlord to forfeit the lease, but I can find no basis for this proposition, reasonable though it may sound. The landlords served no notice to remedy the breach before the expiration of the tenancies and, therefore, were not in a position to forfeit the leases before they expired, and I can see no reason why in those circumstances statutory tenancies did not arise at Christmas, 1950, in favour of each tenant who held over. Whether the same would be true if notices had been served I need not decide, though I think it would. If writs for possession had been issued before Christmas, 1950, thus conditionally avoiding the leases, the position might have been different; though, even so, it would have been arguable that statutory tenancies arose," and then a reference is made to the observation of Asquith L.J. in *Court v. Robinson*.³⁵

I am content to adopt all that passage and to add but little to it. It seems to me that the language of the relevant section, section 3 (1) (as it now is) of the Act of 1933, leaves no room for an argument of that character. The section is in these terms: "No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either. . . ." I then refer to (a) in the First Schedule: ". . . any other obligation of the tenancy (whether under the contract of tenancy or under the principal Acts), so far as the obligation is consistent with the provisions of the principal Acts, has been broken or not performed."

We were referred to section 15 (1) of the Act of 1920, which defines, in so far as there is any definition, the situation of statutory tenants so called; but it seems to me, having read section 3 (1) and the relevant part of Sch. I to the Act of 1933 and section 15 (1) of the Act of 1920, that the Act is saying in plain terms: "You cannot get an order for possession against a tenant or an ex-tenant, unless the court thinks it reasonable and unless there is jurisdiction in the court, by reason, inter alia, that the tenant or ex-tenant has broken either the contract of

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³⁴ Ante, 802.³⁵ [1951] 2 K.B. 60, 73.

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tenancy or the conditions imposed by section 15, or, of course, both.

The commonest case is that of a contractual tenant in arrears of rent, who is then served with a notice to quit and continues in arrear. In that case nobody has ever suggested that because the tenant was in default as regards payment of rent at the time of his contract and continued in default thereafter, that he was deprived of the protection of the Act. It seems to me impossible for Mr. Campbell to avoid the conclusion, if he is right, that a statutory tenant only remains such so long as he strictly observes all the conditions extracted from the contract of tenancy, which section 15 imposes on him as a statutory tenant, and I see, as the learned judge did, no basis for that argument.

Mr. Campbell said this is a very remarkable case and the court ought to do a little judicial legislation just as it did in *Skinner v. Gearey*.³⁶ The court, in that case, said that the only persons who were entitled to the protection of the Act were persons who were in actual occupation, or were in an equivalent situation. That (says Mr. Campbell) was a gloss on the Act itself, and so now this court ought to make a further gloss, the character of which would be somehow so defined and expressed as at any rate to defeat any claim on the part of the present tenant to remain in possession under the Act. Mr. Campbell referred to a phrase used by Scrutton L.J. in *Remon v. City of London Real Property Company*³⁷ in which he described as the persons entitled to the benefit of the Act, persons "who were "willing to carry out the terms of their old tenancy." But, that phrase was, of course, only a general and compendious way of indicating the general policy of the Act; it was not in the least directed to any point such as has been here debated. And in *Skinner v. Gearey*³⁸ the so-called gloss was the explanation given by the court of what was intended in section 15 (1) by the language "tenant who by virtue of the provisions of this Act "retains possession of any dwelling-house." I have been unable to find any language in the Acts which would give any basis or warrant for the suggestion which Mr. Campbell has put forward.

The result of the whole matter is that in each of the five cases, subject to the variation which I have indicated and subject to the language I have used to make clear that the landlords are prejudiced neither in any claim they may bring for damages for trespass nor in their right to go to the county court at any time

³⁶ [1931] 2 K.B. 546.

³⁸ [1931] 2 K.B. 546.

³⁷ [1921] 1 K.B. 59.

and ask for possession on the footing that the continued occupation by the tenant is no longer reasonable, the appeals should be dismissed.

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JENKINS L.J. I agree. Under the tenancy agreements inherited by the plaintiff landlords and the five defendant tenants, the landlords undertook no obligation to supply hot water, electricity, and so on, but were to do so, if at all, only as an act of grace. On the other hand, the tenant under each of these agreements covenanted, among other things, not without the written consent of the landlord to make any alteration or addition to the premises whatsoever, nor erect any stove or pipe, and so on. The relevant words are "nor erect any stove or pipe." The provision excluding any obligation on the part of the landlords to provide hot water was a device designed to escape the impact of the Furnished Houses (Rent Control) Act, 1946, and it was obvious from a practical point of view that the tenants' covenant to which I have referred, imposed a restriction which was only reasonable so long as the landlords did in fact supply hot water. If the landlords ceased supplying hot water, observance by the tenants of the restriction in question would make the flats which they were renting uninhabitable according to modern ideas.

The device, in due course, gave rise to trouble, as such devices generally do, and the landlords found themselves hoist with their own petard, or perhaps I should say the petard of their predecessors in title. On the coming into operation of the Landlord and Tenant Rent Control Act, 1949, or shortly thereafter, certain of the tenants applied to the appropriate tribunal for a reduction of their rent, and in support of their application they called in aid, as they were perfectly entitled to do, the peculiar feature of their tenancy agreement whereunder the landlords were not obliged to provide hot water. They argued that, having regard to this provision, the supply of hot water and other services could not be taken into account in fixing the appropriate rent. That argument was, not unnaturally, accepted by the tribunal, and the rents were reduced accordingly. This, according to the landlords, made the supply of hot water by them an uneconomic proposition; and they therefore discontinued the supply. Protracted negotiations ensued. The landlords offered the hot water at a price which the tenants were not prepared to accept. A number of tenants (including the defendants) applied to the landlords for permission to erect heating installations of

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their own in their respective flats. The landlords, down to the issue of the writ, were ready to grant licences to the tenants authorizing them to put in such installations on certain terms, and I think four tenants (not the parties to this action) did, in fact, accept those terms, and under licence from the landlords erected installations accordingly. The five defendant tenants would not accept the terms of the licence offered, and proceeded to instal their own apparatus in breach of covenant. They thereby committed a tactical error, for the landlords were then enabled, under the provisions of section 3 and Sch. I to the Rent Act of 1933, to make an application for possession against each of the defendants on the strength of the breach of covenant thus committed. That they decided to do, and these actions were, in due course, launched in the High Court.

The fact that the covenant had been broken gave the judge jurisdiction to make orders for possession against the defendant tenants, but only if he considered that it was reasonable to do so. The judge, after a very full and detailed hearing, decided that it would not be reasonable to make an unqualified order for possession, and (apart from the fact that 33 requisitioned flats already had similar installations), the ground on which he so held was, in effect, that the landlords had been willing, down to the issue of the writ, to grant licences for the installation of hot water in the form to which I have already referred. The judge therefore held that it would be unreasonable to make an order for possession against these tenants so long as they were willing to enter into, and did enter into, stipulations with regard to the offending water heaters, which would give the landlords substantially the same protection as they would have had if these tenants had done what they ought to have done and had accepted licences from the landlords on the terms offered by them.

In my view, the learned judge came to a right conclusion in all the circumstances of this case. Moreover, the matter was eminently one for his discretion with which this court should not interfere unless he has exceeded his jurisdiction, or has committed some error of principle in exercising his discretion.

His order has been criticized on the ground that the effect of it is to compel the landlords to retain the defendant tenants on what amount to new terms of tenancy. It is said that it compels the landlords to assent to a continuing breach of covenant, and furthermore to submit to a continuing trespass, albeit a small and technical trespass; for the flues of these heaters are, in fact,

attached by means of brackets to balconies outside the flats, which are not included in the respective demises to the defendant tenants. As to the trespass, I entirely agree with my Lord that no condition imposed in these proceedings can, or should, have the effect of legalizing it. That is a matter entirely outside the Rent Acts and to which the discretion of the court under that legislation by no means extends.

As to the breach of covenant, it has been described as a continuing breach and, as I have said, it is a matter of complaint on the part of the landlords that the judge should (as it were) have perpetuated and authorized a continuing breach. For my part I would not describe it as a continuing breach. I think, where there is a covenant not to instal a heater, the breach is complete when the heater is installed. Nevertheless, the effect of the order undoubtedly is to withhold possession from the landlords when there has been a breach of covenant and that breach has not been remedied. In Rent Act cases, where there has been a breach of covenant and possession is sought on that ground, the court will not, in general, withhold an order for possession except on the footing that the breach is to be remedied; but that is not an invariable rule in all cases, as appears from *Bell London and Provincial Properties Ltd. v. Reuben*.³⁹ In the circumstances of the present case, which are undoubtedly *sui generis*, I think it was open to the judge, in the exercise of his discretion, to make the order in the form it took. It would have been more in accordance with the usual practice to make an order for possession and suspend it so long as the conditions were complied with; but, in my view, that is not the only way in which a case of this kind can be dealt with, although it is the method for which express sanction is to be found in section 5 (2) of the Act of 1920. It was open to the judge in this case, if he thought right, to exercise his discretion by refusing an order for possession altogether, on the ground that he did not consider it reasonable to make such an order. If he could do that, it seems to me necessarily to follow that it was open to him to say: "If the defendants comply with such and such conditions, which I now state, I will not make an order for possession, for I do not think it would be reasonable to do so; on the other hand, if they do not comply with those conditions, then the order for possession must go." Accordingly, I see no reason for disturbing the order of the judge, except in so far as there should.

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in accordance with what has fallen from my Lord, be substituted in the order a provision for each defendant tenant to enter into a deed of covenant in the appropriate terms in substitution for the agreement contemplated in the order as made by the learned judge; and also that those terms should be varied, as my Lord has proposed, with respect to sub-paragraph (e) of paragraph 2 of the draft form of licence, the order made by this court being made on the footing to which my Lord has referred, namely, that it is in no way to preclude a further application by the landlords in the event of any relevant change in the circumstances concerning their arrangements for the central supply of water. It should also be made clear that these conditions are not to be regarded as authorizing the technical trespass involved in the defendant tenants' installations; although, speaking for myself, I cannot think that, if any further proceedings were brought about that trifling matter, the court would be prepared to grant an injunction. It seems to me that the case would be one in which justice would be met by purely nominal damages. It is to be hoped that the parties will not have found that their past experience has so whetted their appetites for litigation that the landlords will think it worth while to pursue any claim of that kind. That, I think, disposes of the substance of the action itself.

There remains the question of costs. Considered as a claim for possession, it is plain that the claim in each of the actions should have been brought in the county court in accordance with the provisions of section 17 (2) of the Act of 1920. *Prima facie*, therefore, the position is that, having chosen to bring in the High Court proceedings arising out of the Act which they could have brought in the county court, the landlords are not entitled to recover any costs.

For the purpose of escaping that unwelcome conclusion, counsel for the landlords relies on the circumstance that, in addition to the claims for possession in these actions, there are claims for damages for breach of contract and trespass, and it is said that, inasmuch as the amounts claimed under those heads were not expressed as liquidated sums, those were claims which could only have been brought in the High Court, and that, as it was convenient to join them with the claim for possession, the entire action was one which was properly brought in the High Court notwithstanding section 17 (2) of the Act. With that argument I cannot agree. The substantial object of these proceedings was to obtain possession of premises within the

protection of the Rent Acts. The claim for damages for breach of contract might, I think, in itself be regarded as a claim arising out of the Acts just as much as the claim for possession itself, inasmuch as this is a claim against a statutory tenant. In any case the observations I am about to make in regard to the claims in trespass are equally applicable to the claims for breach of covenant. The claim for damages in trespass could manifestly have been brought in the county court. I decline, therefore, to accept the view that a litigant could justify bringing in the High Court a claim well within the county court jurisdiction by the simple expedient of refusing to put a figure on it. In this case damages of 10s. were awarded in each of the five cases. The claims for trespass, by themselves, could then have been brought in the county court; and it is abundantly clear that the joinder of those claims with claims plainly arising under the Rent Acts could not have the effect of displacing the *prima facie* operation of subsection (2) of section 17 so as to justify the bringing of the claims arising under the Acts in the High Court, except on the terms that the plaintiffs should not recover any costs, even if the joinder of claims outside the county court jurisdiction with a claim arising under the Rent Acts has the effect of excluding the last mentioned claim from the category of proceedings under the Acts which could have been taken in the county court for the purposes of section 17 (2).

The circumstances of this particular case make it unnecessary for me to consider the questions arising under section 17 (2) which were discussed in *Russoff v. Lipovitch*,⁴⁰ *Smith v. Kirby*⁴¹ and *Wolfe v. Clarkson*⁴²; and I would like to reserve my opinion upon the effect of those cases until such time as it is necessary, with reference to a particular matter of costs, to decide the difficult points involved.

As to Mr. Campbell's argument to the effect that in the circumstances of this case the tenants had succeeded in putting themselves outside the protection of the Rent Acts by (if I may so describe it) their contumacious attitude with regard to their obligations under their respective tenancies, I can only say that, having given the matter the best attention I can, I can find nothing in the Acts, or in any of the decisions under the Acts to which we have been referred, to justify the conclusion to which he invites us to come.

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⁴⁰ [1925] 1 K.B. 628.⁴² [1950] 2 All E.R. 529.⁴¹ [1947] 1 All E.R. 459.

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Accordingly, I agree that, subject only to the modifications proposed by my Lord in the order as made by the learned judge, these appeals fail and should be dismissed.

HODSON L.J. I agree. The learned judge decided that in the circumstances of these five cases it would be unreasonable to make an order for possession, and, in my view, it is quite impossible to attack that decision on the ground that, in exercising his discretion, he took into account anything that he ought not, or the reverse.

In withholding possession, he imposed terms on the tenants in each case, and I think he was entitled so to do. Some of the arguments addressed to this court have been directed to showing that the judge was imposing terms on the landlords, and, indeed, in one part of his judgment, he did, I think, by mistake, state that that was what he was doing, but he begins by saying⁴³: "In my judgment, it"—that is, permission for the tenants to remain in possession—"should be on the terms that each of "them signs a document substantially in the form of the draft "agreement accompanying the landlords' letter to the solicitors "of Mr. Jones of November 16, 1950." In that passage he is making it plain that he is imposing terms on the tenants, and the tenants only, and that is what I think he had jurisdiction to do—not to impose terms on the landlords. For that reason I think it desirable that there should be a variation in the order so as to remove the word "agreement" which appears to indicate two parties rather than one, and to substitute the form of order which my Lord proposes.

Also I agree that as the learned judge indicated in his draft judgment, before it was shortened in the form in which it now appears in the Law Reports,⁴⁴ that clause (e) should be omitted from the document in the form of a covenant which the tenants were to be required to sign in order to avoid possession being given against them. I think in the circumstances of this case that the judge's order was the only practical order to make. In other cases it would have been more usual to have made an order for possession, suspended so long as the conditions imposed were complied with; but here there is the difficulty that, if the suspended order were made, it might involve further applications to the High Court which, in turn, would entail a disablement on the landlords with regard to costs.

⁴³ Ante, 803.⁴⁴ Ante, 803.

That brings me to consider the question of costs. One of the complaints on this appeal was that the judge was wrong in holding that he was precluded from awarding costs to the plaintiffs by section 17 (2) of the Act of 1920, although he had said that, on the analogy of an action for forfeiture in the ordinary course of events, he would have given the plaintiffs costs unless he felt precluded from doing so. I agree that he was precluded. The language of section 17 (2) is clear: "A county court shall "have jurisdiction to deal with any claim or other proceedings "arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise "the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings "under this Act in the High Court which he could have taken "in the county court, he shall not be entitled to recover any "costs."

The claim for possession was a claim under this Act. This section was clearly drafted to discourage proceedings being taken in the High Court under this Act by preventing a plaintiff from recovering costs if he does so; and it seems to me to be wrong that a plaintiff should be able to succeed in avoiding the consequence of section 17 (2) merely by joining with a claim under this Act another claim which is not under this Act. Accordingly, in so far as Hilbery J. in the last sentence of his judgment in *Smith v. Kirby*⁴⁵ says: "That subsection deals with a case "where the whole claim arises out of this Act," I would respectfully disagree. I do not propose to explore this ground further, because disagreeing with that sentence does not necessarily involve casting doubt on the correctness of the decision in *Smith v. Kirby*,⁴⁵ which has been discussed, and which met with some amount of approval in the judgment of Cohen L.J. in the case of *Wolfe v. Clarkson*.⁴⁶

I agree that the appeals substantially, subject to the minor alterations which have been mentioned, fail in all respects.

Appeals dismissed. Order varied.

Solicitors: *Forsythe, Kerman & Phillips; Bird & Bird.*

H. C. G.

⁴⁵ [1947] 1 All E.R. 459.

⁴⁶ [1950] 2 All E.R. 529.

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Will—Construction—Gift to son for life and then to his sons “successively according to seniority in tail male”—Whether gift to son constituted life tenancy or tenancy in tail male—Rule in Shelley’s case.

A testator, who died in 1921, by his will gave certain settled freeholds “to the use of my son William during his life with “remainder to the use of his first and other sons successively according to seniority in tail male.”

Held, that the effect of the gift was to constitute the testator’s son William a tenant for life of the settled freeholds and not a tenant in tail male, and that the rule in *Shelley’s Case* (1581) 1 Co. Rep. 93b. did not apply.

Goodtitle v. Herring (1801) 1 East 264 followed.

Dicta of Lord Macnaghten and Lord Davey in *Van Grutten v. Foxwell* [1897] A.C. 658, considered.

ADJOURNED SUMMONS.

By his will dated May 14, 1920, a testator, who died on December 20, 1921, gave certain settled freeholds “to the use “of my son William during his life without impeachment of “waste with remainder to the use of his first and other sons “successively according to seniority in tail male.”

A summons was taken out by the trustees of the will and settlement affecting the settled freeholds to determine whether the testator’s son William was entitled to an interest in the settled freeholds in tail male or some other and, if so, what other interest.

Michaël Bowles for the plaintiffs.

Geoffrey Cross Q.C. and *G. T. Hesketh* for the defendant, the testator’s son, William. The rule in *Shelley’s Case*¹ is applicable to the words of the present clause, and the son is entitled as tenant in tail male. The form of this clause is taken from a common form of precedent, but it does not appear that these words have ever come up for the consideration of the court. In *Van Grutten v. Foxwell*² Lord Macnaghten and Lord Davey, in their speeches, clearly indicated that, in order that the rule in *Shelley’s Case* might be applicable in a clause of this kind, it was not necessary to have the words “heirs male of the body”—see their observations on pp. 667 and 684 respectively.

¹ (1581) 1 Co.Rep. 93b.

² [1897] A.C. 658, 667, 684.

It may well be that the words of the present clause achieve a result which was not expected, but the words "heirs male of the body" are not the only words which bring the rule in *Shelley's Case* into operation. The present words do so. There is nothing sacrosanct about the words "heirs male of the body," and any equivalent form of words will cause the rule to apply. The present wording embodies the concept of the estate, after the death of the son, descending in the male line ad infinitum.

*In re Buckton*³ supports this contention. There the provision was treated as giving the tenant for life an estate in tail male in possession. The words "tail male" cannot be isolated. The expression imports the whole male blood of the testator's son. Reading the expression, therefore, as a whole, it embraces the whole line of the testator's son ad infinitum. That submission is supported by *In re Buckton*.³

Henry Salt Q.C. and *H. E. Francis* for the second defendant (a beneficiary presumptively entitled in remainder after any sons whom the first defendant might hereafter have and who might attain an entailed interest). The will gives the testator's son William a life tenancy only. The next following gifts to his sons successively in tail male are gifts to each of them by purchase. There is no room here for the application of the rule in *Shelley's Case*. It is permissible and necessary to look at the will as a whole to see what the testator meant in clause 9. He is giving successive remainders to personae designatae, as is clear from other clauses in the will, in which he speaks of tenants for life and tenants in tail by purchase.

In this case the rule in *Shelley's Case* cannot apply, because the material words were not used by the testator on any construction as equivalent to "heirs of the body" of William. It is only fortuitous that in the actual result they might work out as identical with William's heirs male.

The observations in the speeches of Lord Macnaghten and Lord Davey are obiter, and *In re Buckton*³ is distinguishable from the present case, because this testator is giving his property to persons by description one after another. The words in *In re Buckton*³ were different from those in the present case, and it is doubtful whether Kekewich J. rightly construed them.

In construing the words of the gift the court must metaphorically sit in the testator's armchair and consider their connotation as used by him. Here the testator's own dictionary

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³ [1907] 2 Ch. 406.

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shows that connotation, namely, that what he had in mind was a succession of individuals.

All that Lord Macnaghten and Lord Davey meant to say in their obiter dicta is that, if an expression is found in a will, which is truly to be treated as being the intended and true equivalent of "heirs of the body," it must be so treated; and there is then room for the application of the rule in *Shelley's Case*.

The history and statement of the rule will be found in Challis on Real Property (1911), 3rd ed., at p. 152—see also p. 166. The rule is stated in chapter 13 of the first edition (1885) in identically the same form as in the third edition of 1911, and in each case in terms which substantiate our argument in respect of words like the present in documents before and after the dicta in *Van Grutten v. Foxwell*⁴ in 1897.

The view taken by the profession was also taken and remained unshaken before and after 1897 in the books of conveyancing precedents where a disposition in terms indistinguishable from the present one is to be found in Davidson's Concise Precedents in Conveyancing from 1880, down to and after the Law of Property Act, 1925. Nor did the courts consider *Shelley's Case* applicable to the present formula: see *In re Scott*⁵; *In re Routledge*⁶; and *Goodtitle v. Herring*,⁷ which was not cited in *Van Grutten v. Foxwell*.⁸

The whole practice of nineteenth and twentieth century conveyancing down to the abolition of the rule in 1925 and the view of the profession and the courts would be upset if the novel proposition contended for on behalf of the first defendant was now adopted. [They referred to Davidson's Concise Precedents in Conveyancing, 3rd ed. (1880), Vol. 4, pp. 387, 388; Prideaux's Precedents in Conveyancing, 23rd ed. (1937), vol. 3, p. 857; and Key and Elphinstone's Precedents in Conveyancing.]

Cross Q.C. in reply.

Cur. adv. vult.

July 3. ROXBURGH J. This summons relates to the rule of law known as "the rule in *Shelley's Case*," which, after being in disfavour for more than a century, was abolished as from January 1, 1926. Posthumously, as it were, Mr. Cross has been bold enough to submit that, although no breath of suspicion had been cast on them while the rule was in force, all strict settlements of land made in common form before that date, and in

⁴ [1897] A.C. 658.

⁵ [1911] 2 Ch. 374.

⁶ [1942] Ch. 457.

⁷ (1801) 1 East 263.

⁸ [1897] A.C. 658.

particular the present settlement, are vitiated by that rule; and he has supported his submission by formidable argument. The settlement is by a will of a testator who died on December 20, 1921, and the material disposition is "to the use of my son William during his life . . . with remainder to the use of his first and other sons successively according to seniority in tail male" with remainders over. The testator's son William (who has no issue) claims to be in possession, not as tenant for life, but as tenant in tail male under the rule in *Shelley's Case*.

The rule was stated and described in the first edition of Challis on the Law of Real Property (1885) as follows, at page 123: "In the limitations now under consideration, there occurs always an estate of freehold limited to a specified person, and a subsequent limitation, whether immediate or remote, expressed to be made to the heirs, or to some class of the heirs, of the same person. The prior estate and the subsequent limitation must both arise under or by virtue of the same instrument. Grammatically, the construction of the second limitation might be, to give a remainder by purchase to the specified heirs. And since the person whose heirs they are, or rather, are to be, is living at the date of the limitation, such a remainder, if taken by the heirs as purchasers, would be a contingent remainder of Fearn's fourth class, being a limitation in remainder to a person not yet ascertained or not yet in being. But the law puts upon the limitation to the heirs a different construction, not giving to them any estate at all by purchase, but taking account of the mention of the heirs only for the purpose of giving a corresponding estate to the specified ancestor. Therefore, it is commonly said, that in limitations coming within the rule in *Shelley's Case*, the word heirs is not a word of purchase but a word of limitation."

Now in the present case no limitation is expressed to be made to the heirs, or to a class of the heirs of William, and it accordingly differs fundamentally from *Van Grutten v. Foxwell*,⁸ in which there was an express limitation to the heirs of the body of the propositus, but Mr. Cross founds himself on two passages, admittedly obiter, in the speeches of Lord Macnaghten and Lord Davey.

Lord Macnaghten said: "It is hardly necessary to observe that any expression which imports the whole succession of inheritable blood has the same effect in bringing the rule into operation as the word 'heirs' . . ."

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⁸ [1897] A.C. 658.

⁹ Ibid. 668.

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Lord Davey said ¹⁰: "But the question always remains, "whether the language of the gift after the life estate properly "construed is such as to embrace the whole line of heirs or heirs "of the body or issue. . . ."

These dicta did not deflect the practice of conveyancers drawing strict settlements or raise any query as to their efficacy until now (see, for example, Key and Elphinstone's *Precedents in Conveyancing*, Prideaux's *Precedents in Conveyancing*, or Challis's *Law of Real Property*, 3rd ed., chap. 13). But Mr. Cross submits that the phrase "his first and other sons successively according to seniority in tail male" imports the whole succession of male inheritable blood of William, and embraces the whole line of the heirs male of the body of William, and that therefore the rule in *Shelley's Case* applies. I should be unable to resist the logic of this argument if the dicta were to be construed in isolation and accepted as a complete guide to the problem. But in my judgment they are not.

The case of *Goodtitle v. Herring* ¹¹ appears to me to be conclusive authority to support my conclusion. In that case the devise was to the use of Margaret Davie for life, then "to the "use of and in trust for the heirs male of the body of the said "Margaret Davie to be begotten, severally, successively, and in "remainder one after another as they and every of them should "be in seniority of age and priority of birth, the elder of such "sons and the heirs male of his body lawfully issuing being "always preferred, and to take before the younger of such son "and sons and the heirs male of his and their body and bodies."

It will be noted that the devise there (unlike the devise here) actually referred to the heirs male of the body of Margaret, but it also included words closely resembling those in the present case. It was held that the rule did not apply.

Lord Kenyon C.J. said ¹²: "The intention is most obvious to "give the first taker only an estate for life; but if that intention "could not be carried into effect without shaking a positive rule "of law I should certainly bow to the decisions," and after considering them he concluded that they "all conspire to show "that Margaret Davie took only an estate for life, and not in "tail."

Grose J. said ¹²: "The only question is, whether the words "'heirs male of the body of Margaret Davie,' etc., can by the

¹⁰ [1897] A.C. 658, 685.

¹² Ibid. 272, 273, 274.

¹¹ 1 East 264.

"subsequent words be explained to be used as words of purchase?
 "That must be determined by considering what the intent of the
 "testatrix was, and whether such intent can be effectuated
 "within settled rules of law."

Lawrence J., after considering the terms of the devise, said ¹²:
 "It was the same as if the testatrix had said 'by heirs male
 "of the body I mean the eldest and other son and sons of
 "Margaret Davie,' and if she had said so in as many words it
 "cannot be questioned but that the former words must have had
 "that construction put upon them."

The whole of the judgment of Le Blanc J. is in point.
 "There is no rule of law to prevent the words 'heirs male of
 "the body' from being words of purchase, if they are clearly
 "intended so to be. Now here the testatrix expressly says
 "'such son and sons,' plainly referring to the same persons she
 "had before described as heirs male of the body, etc., and
 "pointing out what estate they were to take. And having
 "provided for the sons she proceeds to provide for the daughters
 "of Margaret Davie, which confirms the construction put upon
 "the former words. Therefore I am clearly of opinion that
 "Margaret Davie took only an estate for life, and that the sons
 "took as purchasers."

This case seems to me to be clear authority for the proposition
 that, in a devise in common form in a strict settlement, the sons
 of the propositus take as purchasers, and the words devising
 estates tail to them should not be construed as words delimiting
 the estate of the propositus. If this is so, the rule in *Shelley's*
Case cannot apply. •

I feel sure that neither Lord Macnaghten nor Lord Davey
 intended to cast any doubt on the efficacy of such a settlement,
 which was treated as beyond question in 1801 and never after-
 wards doubted. This was the view of the profession. In *In re*
Scott,¹³ for example, both Warrington J. and all counsel tacitly
 proceeded on that basis, and the practice of conveyancers did not
 change.

Perhaps the clue to the interpretation of Lord Macnaghten's
 dictum is to be found in the passage in *Van Grutten v. Foxwell*,¹⁴
 where he says "the question now in every case must be whether
 "the expression requiring exposition, be it 'heirs' or 'heirs of
 "'the body,' or any other expression which may have the like
 "meaning, is used as the designation of a particular individual

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¹² 1 East 264, 272, 273, 274.

¹⁴ [1897] A.C. 658, 677.

¹³ [1911] 2 Ch. 374.

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“ or a particular class of objects, or whether, on the other hand, “ it includes the whole line of succession capable of inheriting.”

This passage seems to me to show that an expression properly construed as designating particular individuals is not to be regarded as one which includes the whole line of succession capable of inheriting or imports the whole succession of inheritable blood merely because the individuals designated do in fact comprise the whole line of succession capable of inheriting. Lord Herschell must, I think, have so understood Lord Macnaghten, because he says ¹⁵: “ If the words which are added, or, indeed, “ any provisions to be found in other parts of the will, shew that “ the expression ‘ heirs ’ or ‘ heirs of the body ’ was not intended “ to be used in the ordinary legal sense, but was intended to “ designate some individual person or particular class of persons, “ effect may be given to the intention of the testator thus “ expressed. The rule in *Shelley’s Case* does not then apply, “ because the limitation after the estate for life is not upon the “ true construction of the will to the heirs or heirs of the body “ of the tenant for life in the legal sense of those words, any “ more than it would have applied if the gift had been in terms “ to a designated person or a designated class,” and having said this he expressly agrees with Lord Macnaghten as to the scope of the rule.

The clue to Lord Davey’s dictum is, I think, similar. The reasoning ¹⁶ (read as a whole) seems to me to show that an expression designating a particular class would not be regarded by him as embracing the whole line of heirs merely because they all happened to fall within its orbit.

But whether or not I have accurately interpreted these dicta, I am convinced that strict settlements in common form (including the present settlement) must be, and were intended to be, excluded from their scope.

Solicitors: *Church, Rendell, for Pitts-Tuckers, Barnstaple; Vandercom, Stanton & Co.; Walker, Martineau & Co.*

J. L. D.

¹⁵ [1897] A.C. 658, 663.

¹⁶ *Ibid.* 685.

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[1951 B. 1905.]

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June 20,
23, 24.

Easement—Implied grant—Way of necessity—Dominant tenement not landlocked by land retained by grantor at date of conveyance.

In 1947 the plaintiff's predecessor in title bought from the defendant a parcel of land which was enclosed on all sides either by the land retained by the defendant or by land belonging to strangers over which neither the defendant nor the grantee had any rights. At the date of the conveyance access to that parcel was obtained over a disused airfield abutting on the highway to the east of the parcel by permission of the owner of the land on which the airfield had been constructed and both the original grantee and the plaintiff after the land had been conveyed to him in 1949 used that permissive way, but the way was closed in 1950. The plaintiff thereupon claimed to be entitled to a right of way over the defendant's land to and from the highway on which the southern part of the defendant's land abutted.

Held, that a way of necessity over the defendant's land in favour of the grantee and his successors was implied by law as incident to the grant, notwithstanding that the land granted was not entirely enclosed by the land of the grantor, and that the implication was not rebutted by the fact that at the date of the grant there existed a permissive way to the land over the land of a stranger.

Gayford v. Moffatt (1868) L.R. 4 Ch. 133, considered.

ACTION.

The defendant was the owner of about 17 acres of land, the southern portion of which fronted on to the highway. By a conveyance dated November 7, 1947, the defendant conveyed to one W. J. Farmery the northernmost part of his land for the sum of £250 for the purpose of building a house on it and using it as a smallholding, the defendant retaining the remaining 14 acres. The land so conveyed was a triangular shaped plot which was divided from the rest of the defendant's land by a short concrete road which joined up to a circular runway on an adjoining airfield then fallen into disuse. The runway continued round to the east and joined up with another highway. By the conveyance the defendant granted to W. J. Farmery an express right of way for all purposes over the concrete road.

By a conveyance dated October 14, 1949, W. J. Farmery conveyed to the plaintiff the land comprised in the conveyance

[Reported by J. A. GRIFFITHS, Barrister-at-Law.]

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of November 7, 1947, together with the benefit of the right of way over the concrete road for the sum of £950, to be used for the same purposes.

At the time of the conveyance of 1947 the only lawful access to the land thereby conveyed from the highway was by means of the airfield runway over which there was a permissive right of way, or over the defendant's land to the extent of any right of way granted by the defendant. The defendant did not own the land on which the airfield stood, nor did he own the land to the north-east, north-west, or west of the land comprised in the conveyance.

In 1950 the Agricultural Land Commission were proposing to farm the land on which the airfield stood, and for that purpose proceeded to fence off the plaintiff's land, with the result that he could no longer take a vehicle on to the airfield runway and thereby gain access to the highway. As the defendant refused to allow the plaintiff a way over his land, the plaintiff brought an action claiming (1) a declaration that he was entitled as of necessity to a right of way to and from his land from and to the highway over the adjoining land of the defendant, and that such right of way was exercisable for all purposes, or, alternatively, for all such purposes as were necessary for the user of the plaintiff's land in any manner contemplated by the conveyance of November 7, 1947; (2) an injunction restraining the defendant from interfering by himself, or his servants or agents, with the user of such right of way by the plaintiff.

The defendant, by his defence, pleaded that as a matter of law the plaintiff was not entitled to any right of way of necessity over the defendant's land inasmuch as at the date of the conveyance of November 7, 1947, the land comprised therein was not entirely enclosed by the defendant's land.

He also maintained that Farmery had in the course of the negotiations leading to the conveyance of 1947 expressly agreed to abandon all claim to a right of way over the defendant's land, but the court found as a fact that there had been no such agreement and that there had been no more than an agreement or undertaking by Farmery that so long as he was allowed, even permissively, to use the way over the airfield he would not insist on the exercise of the legal right of way over the defendant's land, that he would endeavour to obtain a legal right of way over the airfield, and if he succeeded in so doing he would abandon his right to have a way over the defendant's land.

The report is confined to the question of law raised by the defendant.

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H. E. Francis for the plaintiff. The plaintiff is entitled to a right of way as of necessity over the defendant's land. *Gayford v. Moffatt*¹ is authority for the proposition that in order to imply a way of necessity the land of the grantee need not be entirely surrounded by that of the grantor at the date of the conveyance; the same point is shown more clearly by *Holmes v. Goring*.² It is submitted that the observations of Kekewich J. to the contrary in *Titchmarsh v. Royston Water Co. Ltd.*³ were obiter, and in any event were contrary to authority, and accordingly should not be followed: see Halsbury's Laws of England, 2nd ed., Vol. 11, p. 328 (d).

[DANCKWERTS J. If the matter depends on implied grant from which the grantor cannot derogate, it seems immaterial that there is adjoining land owned by a third party.]

It is also not necessary that the necessity should exist at the actual date of the grant; it is sufficient if the parties contemplated at that time that the necessity would or might arise: see *Davies v. Sear*,⁴ which was referred to without criticism by the Court of Appeal in *Allen v. Seckham*,⁵ per Cotton L.J., and *Wheeldon v. Burrows*,⁶ per Thesiger L.J.

There was nothing in the wording of the conveyance to Farmery, or in the attendant circumstances, to negative the intention that Farmery should have means of access over the defendant's land, if the way over the airfield should be closed.

J. F. Bowyer for the defendant. The question whether in order to imply a way of necessity the land of the grantee must be entirely surrounded by that of the grantor at the date of the grant is not clearly stated in the cases which have been cited; in particular, *Gayford v. Moffatt*⁷ shows that the point was not present to the minds of the court: see per Lord Cairns L.C.⁸

As to whether a permissive way of access existing at the time of the grant is sufficient to exclude the implication of a way of necessity, it is submitted that the necessity must arise at the date of the grant, and that the facts must be such that the property cannot be enjoyed without it: see Gale on Easements,

¹ (1868) L.R. 4 Ch. 133.

² (1824) 2 Bing. 76.

³ (1889) 81 L.T. 673, 675.

⁴ (1869) L.R. 7 Eq. 427.

⁵ (1878) 11 Ch.D. 790, 797.

⁶ (1879) 12 Ch.D. 31, 58.

⁷ L.R. 4 Ch. 133.

⁸ Ibid. 135.

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12th ed., p. 160; *Union Lighterage Co. v. London Graving Dock Co.*⁹; *Ray v. Hazeldine*.¹⁰ *Davies v. Sear*¹¹ was a very special case: see the observations in Gale on Easements, 12th ed., p. 164.

Francis in reply.

DANCKWERTS J. [having stated the facts:] In those circumstances, in my opinion, if nothing else had occurred, the law would clearly have implied in favour of the grantee of the triangular piece of land a way of necessity—that is to say, a right of way to enable the grantee to obtain access over the grantor's land in some line to be chosen by the grantor; so that the triangular piece of land would be of some use to the grantee instead of being useless, as it would be if no right of way existed. I am satisfied that the law would have implied such a right notwithstanding that the piece of land granted by the conveyance of 1947 was not completely surrounded by the grantor's land, but on three sides abutted on to land which belonged to other persons.

The matter is not entirely clear on the authorities. In Gale on Easements, 12th ed., at pp. 158 and 159, the following statement is to be found: "Section 2. *Easements of necessity*. "Another class of easements acquired by implied grant or "reservation are those which are usually termed 'easements of " 'necessity,' though they might with more correctness be called "easements incident to some act of the owners of the dominant "and servient tenements without which the intention of the "parties to the severance cannot be carried into effect. . . . "Easements called ways of necessity are thus described in "Rolle's Abridgement: 'If I have a field enclosed by my own " 'land on all sides, and I alien this close to another, he shall " 'have a way to this close over my land, as incident to the " 'grant, for otherwise he cannot have any benefit by the grant. " 'And the grantor shall assign the way where he can best spare " 'it. So, too, if the close aliened be not entirely enclosed by " 'my land, but partly by the land of strangers; for he cannot " 'go over the land of strangers. Quaere. . . .'" Thus a doubt is expressed whether a way of necessity is raised in the last case; but in note (p) there is this statement: "(p) For the implication, it is sufficient if the close aliened be partly enclosed by "the grantor's land and partly by the land of strangers": see *Gayford v. Moffatt*.¹² Now it appears that in that case the

⁹ [1902] 2 Ch. 557.

¹⁰ [1904] 2 Ch. 17.

¹¹ L.R. 7 Eq. 427.

¹² L.R. 4 Ch. 133.

grantor's land did not wholly enclose the land granted, but the question referred to in the note in *Gale on Easements* does not appear to have been discussed in that case at all. There is, therefore, no express authority on the point. In my opinion, however, if the grantee has no access to the property which is sold and conveyed to him except over the grantor's land or over the land of some other person or persons whom he cannot compel to give him any legal right of way, common sense demands that a way of necessity should be implied, so as to confer on the grantee a right of way, for the purposes for which the land is conveyed, over the land of the grantor; and it is no answer to say that a permissive method of approach was in fact enjoyed, at the time of the grant, over the land of some person other than the grantor because that permissive method of approach may be determined on the following day, thereby leaving the grantee with no lawful method of approaching the land which he has purchased.

Accordingly, I have come to the conclusion that, if there were nothing else in this case, this would be a case in which the law would imply a way of necessity in favour of the grantee, that is, Mr. Farmery, which would inure to the benefit of the plaintiff as the ultimate grantee of the land.

[His Lordship proceeded to deal exhaustively with the question of fact whether Farmery had agreed to abandon his right to a claim to a way of necessity over the defendant's land, and having stated his finding on that question as briefly summarized above, continued:] In the events which have happened no right of way over the airfield was ever obtained, and the permissive right which was enjoyed for some time has now been determined, and therefore there remains intact the original way of necessity over the defendant's land, and the plaintiff is now entitled to insist on that legal right. In my judgment there was only a conditional abandonment of the right to which the defendant would otherwise have been bound to submit, and, accordingly, the plaintiff is now entitled to enforce that legal right.

In the result the action succeeds.

Judgment for the plaintiff.

Solicitors: *Sharpe, Pritchard & Co., for Rendall, Litchfield & Co., Bournemouth; Birkbeck, Julius, Edwards & Coburn.*

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CITY PERMANENT BUILDING SOCIETY v. MILLER
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[1951 C. No. 4928.]

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Jenkins and
Hodson L.JJ.

Mortgage—Registered land—Agreement in writing before purchase to grant lease for term exceeding three years—Three years' rent paid in advance—Property subsequently purchased by mortgagor—Mortgagor registered as proprietor and building society as chargees on same day—Possession taken by tenant—Whether "overriding interest" vested in tenant—"Lease"—Meaning—Right of mortgagee to possession—Land Registration Act, 1925 (15 Geo. 5, c. 21), ss. 3, 70 (1).

On October 15, 1950, the first defendant (hereinafter called the mortgagor) orally agreed to let to the second defendant (hereinafter called the tenant) the first and second floors of No. 8 Ongar Road, Earls Court, on receiving from her a sum representing three years' rent of the premises. At that time the mortgagor had no interest whatever in the premises. On October 16, he signed a document in the following terms: "I . . . hereby acknowledge to 'have received from [the tenant] the sum of £228 being three 'years' rent at 30s. per week in advance in respect of unfurnished 'premises on the first and second floors of No. 8 Ongar Road . . . 'I agree to grant to [the tenant] an unfurnished tenancy of the 'above premises for three years from October 16, 1950 and 'thereafter on a weekly basis, at a rental of 30s. per week.' The tenant did not then take possession of the premises. On January 4, 1951, the then registered proprietor of the premises assigned to the mortgagor the residue of the term of 99 years from March 25, 1872, under which the premises were held for the sum of £750, of which £650 had been advanced to the mortgagor by the plaintiffs, and, on the same day, the mortgagor executed a legal charge in favour of the plaintiffs to secure that sum. On January 10 the mortgagor sent the key of the premises, which he had agreed to let to her, to the tenant. On January 11 the mortgagor was registered as proprietor of the premises and at the same time the building society was registered as chargees. On January 15 the tenant went into possession under the agreement of October 16 and she had remained in possession ever since, paying no rent. The mortgagor having defaulted in his payments, the building society in these proceedings claimed possession against the mortgagor and the tenant. Harman J. made an order for possession. On appeal by the tenant:—

Held, (1) that in as much as the agreement with the mortgagor was for a term necessarily exceeding three years by a period of at least one week, it was a term which, having regard to the provisions of sections 52 (1) and (2) (d), 53 (1) (a) and 54 (2) of the Law of Property Act, 1925, could only be created by deed. Accordingly, the interest of the tenant under the agreement was at highest that

of a person who had a contract for the grant of a lease and a right to obtain specific performance of that contract. She had neither a legal nor an equitable tenancy.

(2) Assuming, but not deciding, that the tenant's agreement was a specifically enforceable contract, her interest under that agreement was not within section 70 (1) (k) of the Land Registration Act, 1925, "a lease . . . for any term or interest not exceeding "twenty-one years, granted at a rent without taking a fine" so as to constitute an "overriding interest." Notwithstanding the fact that "lease" was defined in section 3 of the Act as including an agreement for a lease, the use of the word "granted" in paragraph (k) of section 70 (1) imported the actual creation of a term of years, whether it was done by deed or by agreement under hand only, where a legal term could be created by a document not under seal. The word "granted" excluded by force of the context the case of a mere agreement for a lease having no more than a contractual effect. The tenant, accordingly, had not shown that she had acquired any interest which took effect in priority to the legal charge of the building society.—It followed that the society was entitled to possession.

The question whether a payment in advance made in commutation of rent amounted in law to a "fine" within section 70 (1) (k) of the Land Registration Act, 1925 considered but not decided.

Decision of Harman J. affirmed.

APPEAL from Harman J.

The first defendant, Henry Wilder Miller, the mortgagor, on October 15, 1950, orally agreed to grant to the second defendant, Mrs. Louie Cumberland, the tenant, a lease or tenancy of the first and second floors of 8 Ongar Road, Earl's Court. At that date the mortgagor, according to the evidence, had no interest whatever, legal or equitable, in 8 Ongar Road. The tenant, who had seven children, was desperately in need of a home and she agreed to pay to the mortgagor three years' rent at 30s. a week in advance which, it was wrongly calculated, amounted to £228. Nothing turned on the fact that £228 was a little under three years' rent. The tenant obtained this sum in part by using a legacy given to her children and in part by a loan. She having paid £228 to the mortgagor, he, on October 16, 1950, signed a document in the following terms: "I, Henry Wilder Miller, hereby acknowledge to have received from Mrs. L. Cumberland the sum of £228, being three years' rent at 30s. per week in advance in respect of unfurnished premises on the "first and second floors of No. 8 Ongar Road, Earl's Court, "S.W.5. I agree to grant to the said Mrs. L. Cumberland an "unfurnished tenancy of the above premises for three years from "16th October, 1950, and thereafter on a weekly basis, at a

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C. A. "rental of 30s. per week." A sixpenny stamp was affixed to
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By an assignment dated January 4, 1951, the Ware Trading Co. Ltd., the then registered proprietors, in consideration of the sum of £750, transferred 8 Ongar Road to the mortgagor for the residue of a term of 99 years from March 25, 1872. By legal charge also dated January 4, 1951, executed contemporaneously with the assignment, the mortgagor charged the property in favour of the plaintiffs, the City Permanent Building Society, to secure the principal sum of £650 and interest, repayable by instalments as therein provided. That legal charge contained a recital that the mortgagor was entitled to the property for the residue of the term. On January 10, 1951, the mortgagor sent to the tenant a key of 8 Ongar Road. On January 11, 1951, the mortgagor was duly registered as proprietor of 8 Ongar Road at the Land Registry and the building society were registered as chargees. On January 15 the tenant took possession of the first and second floors of 8 Ongar Road and had remained in possession ever since under the agreement of October 16, 1950, paying no rent. The mortgagor having defaulted in his payments under the legal charge of January 4, 1951, the building society by this summons claimed possession, the defendants to the summons being the mortgagor and the tenant. At the time when the summons was issued the mortgagor was in prison. He was represented by a solicitor but took no part in the proceedings.

Harman J. made an order for possession, holding that the tenant had not an overriding interest within the Land Charges Act, 1925, s. 70 (1) (k),¹ on the ground that the payment of £228 was a "fine," and, accordingly, the mortgagor had not granted to the tenant a lease without taking a fine. The tenant appealed.

F. B. Marsh for the tenant. The tenant claims that she is entitled to remain in possession as against the plaintiff building society because the society as mortgagees took subject to the tenant's right under the agreement of October 16, 1950. The

¹ Land Registration Act, 1925, s. 3: "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned . . . (x) 'Lease' includes an under-lease and any tenancy or agreement for a lease, under-lease or tenancy."

S. 70 (1): "All registered land

"shall, . . . be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto . . . (k) Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine."

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effect of the agreement was to create an equitable tenancy which was an "overriding interest" under section 70 (1) (k) of the Land Registration Act, 1925, binding on the building society. Harman J. was wrong in holding that the agreement did not create a lease within paragraph (k), since the payment of a rent in advance constituted a "fine." The payment of a sum in advance on account of rent does not constitute a fine. A "fine" is something in the nature of a premium and a payment on account of rent cannot constitute a premium: see the observations of Warrington L.J. in *King v. Earl Cadogan*.² [He referred to the Law of Property Act, 1925, s. 205 (1) (xxiii).]

Secondly, the tenant's interest binds the building society. The legal charge to the building society contained a recital that the mortgagor was the estate owner free from incumbrances. There must have been a scintilla temporis between the assignment to the mortgagor and the execution of the charge to the building society: see *Woolwich Equitable Building Society v. Marshall*³; and accordingly the tenant's interest vested in that period. Even if that view is not correct, it is enough for the tenant to show that under her agreement with the mortgagor she had a right to a lease which was specifically enforceable. Such a right constitutes an overriding interest within section 70 (1) (k), which binds the building society. Having regard to the fact that "lease" is defined in section 3 (x) of the Land Registration Act, 1925, as including an "agreement for a lease," "lease" in paragraph (k) must be read as including an "agreement for a lease." The agreement of October 15, 1950, was an agreement for a lease and accordingly constituted an overriding interest within section 70 (1) (k). [He also referred to *Dudley and District Benefit Building Society v. Emerson*.⁴]

G. D. Johnston for the building society. The agreement of October 15, 1950, did not give to the tenant any interest which is good against the plaintiff building society. It is first submitted that the document is void for uncertainty. If it is not so void, at most it constituted an agreement to grant a lease enforceable by specific performance. The agreement was to grant a tenancy for a period of not less than three years and one week. If this document was intended to operate as a demise, it failed to do so, since the term must exceed three years and such a term can only be created by deed: see sections 52 (2) (d), 53 (1) (a), 54 (1) and (2) of the Law of Property Act, 1925.

² [1915] 3 K.B. 485, 492.⁴ [1949] Ch. 707.³ Ante, 1.

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The interest of this tenant was not an overriding interest within section 70 (1) (k). For an interest to be an overriding interest, it must be a legal interest, not merely an equitable interest enforceable by a court of equity. A lease to be an overriding interest within paragraph (k) must create a legal term. A right to be granted a lease is not within paragraph (k).

Lastly, paragraph (k) does not apply because the payment of the rent in advance constituted a "fine." [He referred to *Lord Ashburton v. Nocton*⁵ and *Samuel v. Salmon & Gluckstein Ltd.*⁶]

EVERSHED M.R. This action was brought by the City Permanent Building Society against two defendants, one Henry Wilder Miller, the mortgagor, and the appellant. Mrs. Louie Isabel Cumberland, who, at the time of the proceedings being brought, was (as she still is) in occupation of a flat on two floors of the premises in question, No. 8 Ongar Road, Earl's Court. From that statement it might well appear (indeed, in a sense it is the fact) that this case makes a fourth in the series of cases of a somewhat similar character which have come before the courts and which begin with *Coventry Permanent Economic Building Society v. Jones*,⁷ decided in 1951.

[His Lordship stated the facts and continued:] It may be convenient to note that the effect (on the face of it) of the registration in the offices of the Land Registry was to show that at one and the same time the mortgagor became the proprietor of this property in Ongar Road and that the building society became a chargee in respect of it. The point is this: In the *Coventry* case⁷ Harman J. (who was also the judge in the present case) held that the execution of the conveyance (for that was a case of unregistered land) and the execution of the charge or mortgage to the building society must be regarded as contemporaneous in every respect, so that there was no *scintilla temporis* during which the mortgagor was the unencumbered freehold owner of the property. That decision defeats the claim, or the argument, that a tenancy which the proprietor had purported to grant before he had become the proprietor was, by the operation of the doctrine of estoppel, made into an effective legal interest in the tenant binding upon the mortgagee, notwithstanding that in the mortgage deed there was an express exclusion of any right to grant a tenancy without the consent of the mortgagee. In the *Coventry*

⁵ [1915] 1 Ch. 274.

⁶ [1946] Ch. 8.

⁷ [1951] W.N. 218; [1951] 1 All E.R. 901.

case⁷ the tenant was, in fact, in possession at the date when the conveyance and mortgage were executed.

That decision of Harman J. was considered in this court in *Universal Permanent Building Society v. Cooke*,⁸ when no view upon its validity was expressed. Danckwerts J. in the third of the series, *Woolwich Equitable Building Society v. Marshall*,⁹ indicated that he did not share Harman J.'s view, particularly where (as in his case) the mortgage deed contained a recital of the fact that the mortgagor was the freehold owner of the property.

In the present case the two documents, the transfer and the charge, were executed on the same day. Mr. Johnston has submitted (so far as it is necessary for his case) that, since no legal estate passed to the proprietor until registration, the fact that the registration shows, on the face of it, that the mortgagor was proprietor subject to the charge which is certified at the same time, would support the application of Harman J.'s view in the *Coventry* case¹⁰ to the present case: in other words, that there is no room here for any scintilla temporis during which the mortgagor was the unencumbered registered owner of the property.

For reasons which I shall later explain, I do not think it necessary to express any view on that matter. It will be observed that at the date when the legal estate passed from the Ware Trading Co. to the mortgagor, or to the mortgagor subject to the charge in favour of the building society, the tenant was still not in possession; the flat was empty; but shortly thereafter, on January 15, she went into possession, and, in reliance on the agreement of October 16, 1950, under the hand of the mortgagor, she paid no more rent. Unfortunately for her, on November 19, 1951, after some 10 months of occupation, she received the unhappy intelligence that the building society had a claim in respect of this property and denied her right to remain in possession at all, or at least to remain in possession on the terms that she had made with the mortgagor. So the present action has been brought to obtain possession against the mortgagor and against her.

Harman J. decided in favour of the building society on a point which depends, or depends primarily, on the construction of the document itself; but before I state what that view was I will refer to section 70 of the Land Registration Act, 1925, because on that section (whichever way it is regarded) rests the building society's argument in this court, as it did in the court below. It

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⁷ [1951] W.N. 218; [1951] 1 All E.R. 901.

⁸ Ante, 95.

⁹ Ante, 1.

¹⁰ [1951] W.N. 218; [1951] 1 All E.R. 901.

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is the tenant's contention that the right or interest which she had acquired from the mortgagor is one which, within the meaning of section 70, overrode the registration in favour of the mortgagor and the building society. [His Lordship read section 70 and the definition of "leases" and "overriding interest" in section 3 of the Land Registration Act, 1925, and continued:] The definitions in section 3 open with the well-known cautionary formula: "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned." In my opinion, notwithstanding the expansion of the word "lease," the answer to the tenant's claim in the present case is that she did not at any time obtain and has not got a "lease," within the meaning of (k), "granted at a rent without taking a fine" for a "term not exceeding twenty-one years." That depends on the view which I take that, in spite of the definition, "lease" cannot be treated for this purpose as comprehending an agreement not itself creating, or effective to create, a term of years at all, but only operating (at best) so as to give a right in a court of equity to specific performance of a contract to grant a lease.

Before, however, I come to that, there is another question, namely, whether the application of paragraph (k) was excluded because this was not a lease for a term granted at a rent "without taking a fine." It was the view of Harman J. that this £228, which the mortgagor succeeded in extorting from the tenant, was a premium and therefore a fine. The material passage in his judgment, a note of which we have, is this: "When I look at this document, I find it an agreement to grant a term of three years for a sum of £228 payable in advance. It does not say that £228 is rent: it merely describes it as equivalent to 30s. a week. . . . It does not seem to me to be a lease granted without taking a fine."

Mr. Marsh has criticized that passage. He suggests that the judge has indeed misread the document; and in a measure I agree with him. I do not think it correct to say, as the judge is recorded to have said, that the document merely describes the £228 as "equivalent to 30s. a week." The document says (and I repeat the phrase): "I . . . Miller, acknowledge to have received from Mrs. L. Cumberland the sum of £228 being three years' rent at 30s. per week in advance." It was pointed out at an early stage by my brother Hodson that £228 is not actually a correct calculation for three years' rent at 30s. a week, and that a better

view is that the sum is at least £234; and Miller, in his excitement or jubilation, therefore lost another possible £6. As a matter of construction, I think the effect would be the same if the sum had not been done and the document had read: "I, Miller, hereby acknowledge to have received from Mrs. Cumberland three years' rent at 30s. a week in advance." When regard is had to such definitions or expositions of the words "fine" and "premium" as may be found, for example, in section 205 of the Law of Property Act, 1925, and in the Landlord and Tenant (Rent Control) Act, 1949, or, again, in the language of Warrington L.J. in the case of *King v. Earl Cadogan*,¹¹ and when regard is also had to the ordinary sense of the words, there is much to be said for the view that this sum, expressed to be an advance payment of 30s. a week rent over three years, is neither a "fine" nor a "premium." On the other hand, it was obviously a device, expressed in a particular way, on the mortgagor's part to get a lump sum, and to substitute a lump sum for a recurring weekly payment during the period from October 16, 1950, to October 16, 1953. I do not wish to lend any encouragement to the consequences which might flow from a decision of this court that a lump sum paid like this, so as to cover the financial obligations of the tenant for three years, was not capable of being regarded as a fine or premium and thereby to encourage persons of the mortgagor's calibre to enter into transactions of this sort. I prefer for myself, therefore, to express no view one way or the other upon the particular point which commended itself to the judge, for I do not think it is necessary that I should. I also can pass over quickly a point taken by the building society that this document is in any case not a complete or effective contract, not a contract which would be capable of specific performance. As at present advised (and I say no more about it) I am disposed to think that it was an effective contract for the purposes of an action for specific performance and that, if the tenant had sued for specific performance, she would have been entitled to succeed, assuming, of course, that the mortgagor had an interest in the land capable of supporting such a decree.

I therefore proceed on the view that what the tenant got, on the face of it, as a result of this transaction, was a right to have granted to her and to obtain from a court of equity an order for the grant to her of a term of years, as stated in the document in

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¹¹ [1915] 3 K.B. 485, 492.

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respect of the premises therein described. In my judgment she never got anything more than that. As Mr. Johnston pointed out, the effect of the contract was that the mortgagor obliged himself to grant to the tenant a term in these premises of three years plus one week at the least, and having regard to that fact, and to the joint effect of sections 52, 53 and 54 of the Law of Property Act, 1925, such an agreement is not capable of conferring upon the tenant any estate in the property; in order that a tenant may acquire an estate of over three years, a deed is necessary.

I therefore proceed to a consideration of the main problem, bearing in mind that all the tenant took at the most was, as I have said, a specifically enforceable contract to grant a lease of at least three years and a week. Mr. Marsh, in his reply, has said that she took an equitable term and that during the moment of time when the mortgagor was registered proprietor unencumbered by the charge that equitable term ripened into a legal interest. I am unable to accept any stage of that argument. I do not think she had an equitable term. Indeed, I do not think that that phrase really can mean anything except that she had the right to get specific performance of this contract; and, assuming in Mr. Marsh's favour that there was a punctum temporis when the mortgagor was the unencumbered proprietor of the property, I am clear that the effect of it was not to create any legal estate in the tenant, more particularly since she was not, as I have explained, at that time in occupation.

Now having dealt with all those points, I return to give my reasons for the conclusion which I have already anticipated. It seems to me that as a matter of English the use of the word "granted" in paragraph (k), whether it be applied to the word "lease" or the word "term," indicates, on the face of it, that the lease or agreement for lease which is to be an overriding interest must be a lease or agreement which is effective to create a term. An agreement for a tenancy or to grant a tenancy for a year would be so effective if the tenant were in possession, but I have felt compelled, upon a review of the whole of the relevant legislation, to conclude that such a limitation of the expanded word "lease" is inevitably imposed by the use of the word "granted"; and since, as I have already stated, the definitions must be read subject to the requirement of the context, that is my conclusion.

Let me say at once that that view is clearly borne out by section 48 (1) of the Land Registration Act, 1925, to which Mr.

Johnston drew attention: "Any lessee or other person entitled to or interested in a lease of registered land, where the term granted is not an overriding interest." And if there be any doubts about the use of this word "granted," they are to my mind inevitably resolved by a consideration of the scheme of this legislation, looking not only at this Act but also at the Land Charges Act, 1925. It is not to be forgotten that the main purpose, from a conveyancing point of view, of all this legislation (and this is emphasized passim throughout the whole of it) was to simplify legal estates and charges and conveyancing practice, broadly speaking, by keeping all equities off the title—a point also emphasized by the terms of section 74 of the Land Registration Act, 1925, itself. It would, therefore, be a surprising thing if, in the case of registered land, the registered proprietor found he was bound to take the legal estate subject to an equitable right of this kind, the right of somebody to get a contract specifically enforced, and more particularly so when the other party to the contract was not, at the time of the contract, the registered proprietor so, therefore, that the party claiming could in no circumstances whatever have had any notice or caution put on the register. It would also have the result (again surprising) that in this respect the proprietor of the registered land would be in a worse position than the transferee of unregistered land. These strange results are, I think, clearly negatived by a consideration of the other matters to which I have already alluded.

Without taking up time by reading at length all the sections, it may safely be stated that a contract, such as this contract, is within the class of "estate contracts" covered by section 10 (c) (iv) of the Land Charges Act, 1925, and registrable as a land charge in the register of land charges. Section 23 of the Land Charges Act says that as respects such land charges "required to be registered . . . after the commencement of this Act, this Act shall not apply thereto, if and so far as they affect registered land, and can be protected under the Land Registration Act, 1925"—not, be it observed, as overriding interests, but "by lodging or registering . . . a restriction, caution . . . or other notice."

That provision is reflected by section 59 of the Land Registration Act, 1925, itself, which says that an " . . . order . . . or other interest which in the case of unregistered land may be protected by registration under the Land Charges Act, 1925, shall, where the land affected . . . is registered, be protected only by lodging a . . . caution," etc. That makes it clear

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that if there is a contract which could be registered and should be registered as a land charge in the case of unregistered land, pursuant to the provisions of the Land Charges Act, 1925, then there is a corresponding provision in the Land Registration Act, 1925, which entitles the person claiming under it to register a caution or notice. If it is not so capable of protection under the Land Registration Act, 1925, it continues to be covered by the Land Charges Act, 1925. In other words, it is plain that the Land Charges Act, 1925, is not wholly excluded quoad registered land.

But those provisions also make clear this result, that, if Mr. Marsh is right, you would get at one and the same time two mutually repugnant provisions in the legislation: (i) the sections under the Land Charges Act, 1925, read with section 59 of the Land Registration Act, 1925, giving protection by notice of certain interests and providing that in the absence of such protection or of registration under the Land Charges Act, 1925, they are avoided, and (ii) at the same time another section (namely, section 70 (1) (k)) which says that though there be no notice or any protection or right to protection still they are overriding interests to which the proprietor has to be subject; and they are such, as I understand the argument, even though they could never have been registered at any time, since the other party to the contract was never at any relevant date proprietor of the land at all. I think that such a repugnance in the Act itself must be avoided, if a fair construction can be given to the language which avoids it; and that is perhaps another approach to the conclusion which I have already reached on the use of the word "granted" in paragraph (k).

Without, therefore, further elaboration, I think that the right which the tenant acquired, if any (and I assume that it was a right against the mortgagor which, had the mortgagor had the land, could have been specifically enforced against him), is not such a right as is comprehended by paragraph (k) of section 70 (1) as an "overriding interest." It will be observed that I have not said, and I do not say, that all these overriding interests must necessarily be "legal" interests—that is, rights enforceable by an action at law. It may or may not be so. Mr. Marsh gave an instance under paragraph (g) where the right might be a purely equitable right. But that again is not a matter that I need decide. Nor need I pursue the question whether, apart from the difficulty I have already mentioned, it could be said here that there was here a term granted "at a rent," although for three

years ex concessis nothing would have been payable at all by way of rent. I base my decision on the point I have tried to explain, and I think for that reason this appeal fails.

JENKINS L.J. I agree. I confess to great sympathy for the tenant, who has been shamefully victimized by the rascality of the mortgagor; but that is no ground for visiting his sins on the building society, who are equally innocent parties. The sole question in the case is which of two perfectly innocent persons must bear a loss occasioned by the fraud of a third party, and it must be determined simply as a question of law.

Mr. Marsh founded himself on the contention that the agreement between the mortgagor and the tenant, evidenced by the memorandum of October 16, 1950, created an "overriding interest" within section 70 (1) (k) of the Land Registration Act, 1925. That section provides (by subsection (1)) that "All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto": and (k) is, "Leases for any term or interest not exceeding 21 years, granted at a rent without taking a fine."

In support of this contention Mr. Marsh advanced two arguments. First, he submitted that the agreement evidenced by the memorandum signed by the mortgagor was apt to create a legal term in the tenant, and would have done so but for the fact that at the time it was entered into the mortgagor himself had not got the requisite estate to support the term. But (the argument proceeds) when the mortgagor completed his purchase and the property was transferred to him, then, although the transfer was immediately followed by the legal charge to the building society, and although the registration of his interest as proprietor and the building society's interest as chargees were effected contemporaneously, nevertheless there must have been a scintilla of time when the mortgagor was the unencumbered owner of the property, and in that instant of time (so proceeds the argument) the tenant's interest as lessee was perfected by estoppel, and she thus became entitled to a lease which was an overriding interest within section 70 (1) (k), being a lease for a term not exceeding 21 years granted at a rent without taking a fine.

To that argument I cannot accede. I have no wish to traverse again unnecessarily the ground covered by my Lord's judgment, but (putting the point as shortly as I can) the fatal flaw in the

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argument appears to me to be this, that by the combined effect of sections 52 (1) and (2) (d), 53 (1) (a) and 54 (2) of the Law of Property Act, 1925, this agreement, evidenced by the memorandum signed by the mortgagor, was not apt to create a legal term in the premises, inasmuch as the agreement, being for a term of three years from October 16, 1950, and thereafter on a weekly basis at a rental of 30s. per week, was an agreement for a term necessarily exceeding the three years by a period of at least one week, and accordingly related to a term which could only be created by deed. It follows, in my view, that the interest of the tenant under this agreement was, at highest, that of a person who had a contract for the grant of a lease and a right to obtain specific performance of that contract.

Mr. Marsh, however, contended that this did not conclude the matter, and he submitted as his second argument that, even if there is no actual lease here, nevertheless the tenant is entitled to succeed on the ground that the description of "overriding interest" mentioned in section 70 (1) (k) of the Land Registration Act, 1925, extends to agreements for leases. Now conceding all else in the tenant's favour, conceding that the agreement is a sufficiently complete and definite agreement to make it capable of specific performance, and conceding that, for a moment of time during the completion of the transaction consisting of the transfer to the mortgagor and the charge by the mortgagor to the building society, the mortgagor had a sufficient interest in the property to constitute this a specifically enforceable contract, nevertheless in my judgment this second argument must also fail. I take that view because, in my judgment, the description of "overriding interest" mentioned in section 70 (1) (k) of the Land Registration Act, 1925, is not apt to include a mere agreement for a lease.

Mr. Marsh relied on the definition of "lease" contained in section 3 (x) of the Land Registration Act, 1925, which is in these terms: "'Lease' includes an underlease and any tenancy 'or agreement for a lease, underlease or tenancy.'" He argued that the word "leases" in section 70 (1) (k) of the same Act must accordingly be construed as including agreements for leases; but, as my Lord has pointed out, the definitions in section 3 are prefaced by the familiar form of words "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say." In my view, the context afforded in section 70 (1) (k) does

"otherwise require." It refers to "Leases for any term or interest not exceeding 21 years, granted at a rent without taking a fine." In my judgment, the use there of the word "granted" clearly imports the actual creation of a term of years, whether it is done by deed or by an agreement under hand only, in that class of case in which a legal term can be created by a document not under seal, or indeed by parol in any case in which an actual tenancy taking effect at law may be created without writing. But in my judgment the word "granted" necessarily imports the actual creation of a term, and that excludes, by force of the context, the case of a mere agreement for a lease, having no more than a contractual effect. To include such a case, in my judgment, section 70 (1) (k) should have read "granted or agreed to be granted."

There are two further points. Subparagraph (k) of section 70 (1) only extends to leases "granted at a rent without taking a fine." The judge held that the £228, the receipt of which was acknowledged in the document of October 16, 1950, was a fine, and in so holding, he did not refer to the fact that it was actually expressed in the document to be "three years' rent at 30s. per week in advance." Speaking for myself, I prefer to reserve for some future occasion the question whether such a payment as this, made in commutation of rent, and described as rent in advance, amounts in law to a fine. If such a payment is not capable in some circumstances of amounting to a fine, it is obvious that in these days of housing shortage a ready way would be provided of evading the legislation which restrains the exaction of premiums. I therefore leave the question whether a sum paid and acknowledged in the particular form of words here used is in law a fine.

It remains to consider whether, apart from the fact that this was a mere agreement to grant and not a grant, the lease here in question could have been said to have been granted "at a rent." In my judgment, in the circumstances of this case the document in question can hardly be described as an agreement for the grant of a lease at a rent in any ordinary sense of that expression. Surely the expression "rent," in the context "granted at a rent," must connote a periodical payment issuing out of the land during the period of the grant, and I should hardly have thought that a grant of a term of three years in consideration of a lump sum, expressed to be the whole of the

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But the reason on which I prefer to found myself is simply that in my judgment, in the context afforded by section 70 (1) (k), the "overriding interest" there described does not extend to a mere agreement for the grant of a lease.

As my Lord has pointed out, that conclusion seems, on the whole, to be supported by a comparison of the provisions of the Land Charges Act, 1925, with those of the Land Registration Act, 1925, and if those provisions are looked at, it cannot be said that the conclusion I have stated leaves wholly unprotected a person holding an agreement for the grant of a lease who has not entered into actual occupation so as to qualify for the protection afforded by subparagraph (g) of section 70 (1) of the Land Registration Act, 1925, because the course contemplated in such cases appears to be that the person claiming an interest of that description, which would be an "estate contract," or, in other words, a land charge Class (C) falling within the provisions of section 10 of the Land Charges Act, 1925, should make an application at the Registry under the Land Registration Act, 1925, for the registration of a caution in respect of such interest. That appears to be provided for by section 59 of the Land Registration Act, 1925.

In the result, therefore, for the reasons given by my Lord and such reasons of my own as I have been able to add, I agree that it is not here shown that the tenant acquired any interest which took effect in priority to the legal charge taken by the building society; and accordingly this appeal fails and must be dismissed.

HODSON L.J. I also have every sympathy with the tenant, who parted with a considerable sum of money, notwithstanding advice to the contrary which she was given, being compelled to do so by her desperate need for a flat. But the question is whether the interest which she has is an "overriding interest" in her favour within the language of section 70 (1) (k) of the Land Registration Act, 1925. Sub-paragraph (k) reads: "Leases for any term or interest not exceeding 21 years, granted at a rent without taking a fine." As my Lords have already said, this appeal fails because the tenant did not have granted to her any lease or term. I have nothing to add upon that matter.

Harman J., at the trial, decided against the tenant on the footing that the word "lease" by definition included an agreement for a lease or tenancy and did not deal with the matter in the way in which it has been disposed of in this court. Having considered the document on that footing as an agreement for a tenancy, he came to the conclusion that it was not "without taking a fine." For my part, I do not desire in any way to dissent from the learned judge's conclusion on that matter. It is quite true that in the note which we have of his judgment, he appears to have referred to the document by saying: "It does not say that £228 'is rent; it merely describes it as equivalent to 30s. a week.'" Those words are not really fit to be applied to this document, because the £228 is described as "rent." But, as Uthwatt J. stated in *Samuel v. Salmon & Gluckstein Ltd.*,¹² in considering the terms of a lease: "The parties may write the agreement in 'such terms as they please and, if so minded, may attach any 'label they wish to the payments agreed to be made by the 'lease. But, when all that is done, it is for the law to decide 'on the effect of the document what payments are rent reserved 'and what not.'" The judge's conclusion may well still be valid when he says that, looking at the document, what he finds there is an agreement to grant a term of three years for a sum of £228 payable in advance, and that that is not "without taking a fine." The definition of "fine" in the Law of Property Act, 1925, includes the word "premium," and the definition of "premium" in Warrington L.J.'s judgment in *King v. Earl Cadogan*¹³ is as follows: "'Premium,' as I understand it, used as it frequently 'is in legal documents, means a cash payment made to the 'lessor, and representing, or supposed to represent, the capital 'value of the difference between the actual rent and the best 'rent that might otherwise be obtained. It is a very familiar 'expression to everybody who knows the forms and powers of 'granting leases.'" Here, one view of the transaction, a view that I confess commends itself to me, is that there was a payment made in advance and in respect of premises let at no rent, and, if that is so, it is not covered by the provisions of section 70 (1) (k) of the Land Registration Act, 1925. Of course, if that was the position apart altogether from the definition of the word "fine" as including the word "premium," the tenant could

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¹² [1946] Ch. 8, 13.

¹³ [1915] 3 K.B. 485, 492.

C. A. never have an "overriding interest" consisting of an equitable right to specific performance, because the exaction of a premium by the mortgagor would itself be a criminal offence, and the tenant would be a party to the crime. (See the Landlord and Tenant (Rent Control) Act, 1949, s. 2.)

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In my judgment the appeal fails.

Appeal dismissed.

Solicitors: *L. A. E. Stiles; Beddington, Hughes & Hobart.*

B. A. B.

UPJOHN J.

EALING BOROUGH COUNCIL v. MINISTER OF
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Local Government—Purchase notice by owner of land—Minister's notice of intention to confirm without modification—Purported confirmation with modification by substituting local planning authority as purchaser without notice—Ultra vires—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 19.

A company owning land in the plaintiffs' district applied, in accordance with the Town and Country Planning Act, 1947, for permission to develop the land. The county council, who were the local planning authority, refused the application, whereupon the company became, under section 19 of the Act, entitled to serve, and on November 30, 1950, did serve, on the plaintiffs a purchase notice requiring the plaintiffs to purchase the company's interest in the land. The plaintiffs, in accordance with section 19 (2) of the Act, transmitted a copy of the purchase notice to the Minister, who, in accordance with section 19 (5), on March 13, 1951, formally notified the plaintiffs, the county council, and the company that the action that he proposed to take was to confirm the purchase notice without modification. None of the parties gave, in response to the Minister's notice, effective notice under section 19 (5) asking for an opportunity of appearing before and being heard by a person appointed by the Minister. There never was such a hearing. An informal meeting which did not amount to such a hearing was held on May 16, 1951, and after it the Minister purported, by letter to the county council dated May 21, 1951, to confirm the purchase notice and to modify it by substituting the county council for the plaintiffs as purchasers. In an action by the plaintiffs claiming a declaration that the purported confirmation was ultra vires and

void, and that they were entitled to acquire the company's premises:—

Held, that by the notice of March 13 the Minister had by necessary implication named the plaintiffs as acquiring authority and in the absence of any formal hearing of the parties he could not, at any rate without first giving a fresh notice of proposed action within the time limited by section 19 (3), change his mind and substitute another authority as purchaser. The pretended notice of May 21 was, therefore, ultra vires and void, and the first notice was to be deemed to be confirmed and the plaintiffs were to be deemed to be authorized to acquire the company's property.

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The plaintiffs, Ealing Borough Council, claimed declarations against the Minister of Housing and Local Government, Middlesex County Council, and Henry Boot & Sons Ltd., that the Minister had in the purported exercise of powers conferred on him by section 19 of the Town and Country Planning Act, 1947,¹ in respect

¹ Town and Country Planning Act, 1947, s. 19 (1): "Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims—(a) that the land has become incapable of reasonably beneficial use in its existing state; and (b) in a case where permission to develop the land was granted as aforesaid subject to conditions, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with those conditions; (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission, he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a 'pur-

'chase notice') requiring that council to purchase his interest in the land in accordance with the provisions of this section."

Subs. (2): "Where a purchase notice is served on any council under this section, that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in paragraphs (a) to (c) of the foregoing subsection are fulfilled, confirm the notice, and thereupon the council shall be deemed to be authorized to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served a notice to treat in respect thereof on such date as the Minister may direct: Provided that . . . (c) if it appears to the Minister, having regard to the probable ultimate use of the land, that it is expedient so to do, he may, if he confirms the notice, modify it, either in relation to the whole or in relation to any part of the land to which it relates, by substituting any other local authority for the council on whom the notice is served, and in any such case the foregoing provisions of this subsection shall have effect accordingly."

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The third defendants, the company, were at all material times the owners of land which was referred to in the action as the Princess Helena College site. That site was situate in the district of the plaintiff council. In the summer of 1950 the company applied for permission under the Act to develop the site by building 50 flats on it, but on July 4, 1950, that permission was refused by the second defendants, the county council, who were the local planning authority for the purposes of the Act. In those circumstances the company became entitled, under section 19 (1) of the Act to give a "purchase notice," directed to the plaintiff council, requiring the council to purchase the land, and did so on November 30, 1950.

The plaintiffs, as required by section 19 (2), transmitted a copy of the notice to the Minister on December 11, 1950, and a copy was sent also to the county council. As required by subsection (5) the Minister sent to the parties concerned notice of his proposed action. The notice to the plaintiffs was addressed to their clerk and dated March 13, 1951, and was in these terms: "Sir: Town and Country Planning Act, 1947. Purchase Notice in respect of Princess Helena College Site, Ealing. I am directed by the Minister of Local Government and Planning to refer to your letter of December 11, 1950, and to say that he has now given

Subs. (3): "If within the period of six months from the date on which a purchase notice is served under this section the Minister has neither confirmed the notice nor taken any such other action as is mentioned in paragraph (a) or paragraph (b) of the last foregoing subsection, nor notified the owner by whom the notice was served that he does not propose to confirm the notice, the notice shall be deemed to be confirmed at the expiration of that period, and the council on whom the notice was served shall be deemed to be authorized to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served notice to treat in respect thereof at the expiration of the said period."

Subs. (5): "Before confirming a purchase notice, or taking any other action in lieu thereof, the Minister

"shall give notice of his proposed action—(a) to the person by whom the notice was served; (b) to the council on whom the notice was served; (c) to the local planning authority for the area in which the land is situated; and (d) to any other local authority whom the Minister proposes, under the foregoing provisions of this section, to substitute for the said council; and if within the period prescribed by the notice under this subsection (not being less than twenty-eight days from the service thereof) any person or authority on whom that notice is served so requires, the Minister shall, before confirming the purchase notice or taking any such other action as aforesaid, afford to those persons and authorities an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose."

“ consideration to the grounds for the purchase notice served on
 “ your council under the Act in respect of the interest held by
 “ Henry Boot & Sons Ltd. in land forming the site of Princess
 “ Helena College, Ealing. The Minister is satisfied that the land
 “ has become incapable of reasonably beneficial use in its existing
 “ state; and having regard to the proposed reservation of the land
 “ for either open space or educational purposes he does not
 “ consider that he would be justified in reversing the planning
 “ authority’s decision that flats should not be erected on the site,
 “ or in directing that permission should be granted for any other
 “ development. He accordingly proposes, unless notified by
 “ April 13, 1951, that your council, the Middlesex County
 “ Council, or the servers of the notice, desire an opportunity of
 “ being heard by a person appointed by him for that purpose, to
 “ confirm the notice without modification. This letter, which is
 “ in similar terms to that sent at the same time to the Middlesex
 “ County Council and Henry Boot & Sons Ltd., the servers of the
 “ notice, is issued by the Minister, in accordance with section
 “ 19 (5) of the Act, as the formal notice of his proposed action.”
 As stated in the last paragraph of that letter, similar letters were
 sent to the company and to the county council.

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The time when the notice could be given under subsection (5)
 of a desire for an opportunity of appearing before and being heard
 by a person appointed by the Minister expired on April 13. A
 day before that date the plaintiffs sent this letter to the Minister:
 “ With reference to your letter of March 13, 1951, the council
 “ have no observations to make on the Minister’s proposal to
 “ confirm the above-mentioned notice without modification. The
 “ Minister will no doubt be aware that the council had previously
 “ decided to acquire the site if possible for open space purposes.”

On the next day, April 13, the county council caused to be
 delivered by hand a letter to the Minister in these terms: “ With
 “ reference to your letter of March 13, I would inform you that a
 “ conference will be held on April 19 between representatives of
 “ the county council and the Ealing Town Council to determine
 “ the future use of the above land. The decision reached will also
 “ determine whether the land the subject of the purchase notice
 “ should be acquired by the county council or the town council.
 “ In these circumstances I am to inform you that the county
 “ council desires an opportunity of being heard by the Minister’s
 “ representative before the purchase notice is confirmed.”

The position at this time was that for some months past there
 had been discussions between the plaintiffs and the county council

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as to the future use of the site. The plaintiffs wanted the site used as a public open space, while the county council, though their minds were not fully made up, considered that it would probably be more usefully employed in providing a site on which a school could be erected. Representatives of the plaintiffs and the county council were arranging to meet on April 19, 1951, to see if they could agree on the future user of the site. That meeting was held, and it did not prove possible to reach agreement on the matter. On April 20, on behalf of the county council, this letter was written to the Minister: "With reference to my letter of April 13, I write to inform you that at the conference with representatives of the Ealing Town Council on April 19, it was not possible to reach agreement as to the future use of the above land. I am accordingly to request that the views of the county council may be heard by a person appointed by the Minister for that purpose before the purchase notice is confirmed," and the writer added that he was sending a copy to the Ealing Borough Council.

On April 26 this letter was written on behalf of the county council to the Minister: "I have to refer to my letter to you of the 20th instant regarding the above matter. The county council in refusing consent for development proposed by Henry Boot & Sons Ltd. intimated that the development plan would reserve the land for either open space or educational purposes. The county council wishes to ensure that the purchase notice shall be confirmed but that the name of the authority which will develop the site shall be inserted in the notice as the acquiring authority. In order that the Minister shall be fully informed in the matter, the county council accordingly seeks an opportunity for its representatives to present their views to one of the Minister's officers, and for Ealing Council to be similarly represented, before the Minister determines who shall be the acquiring authority for the purposes of the purchase notice. If the Minister is agreeable to convene such an informal conference I shall be glad if you will kindly regard the request contained in my letter of 20th instant as withdrawn."

Although the last sentence referred to the letter of April 20, which had been sent out of time, it was treated by all concerned at the time as referring to the letter of April 13 and as constituting a withdrawal of the request contained in that letter for a hearing before a person appointed by the Minister pursuant to section 19 (5), provided always that the Minister was prepared to convene a meeting as suggested in the letter of April 26. This

was agreed and, after telephone messages had been exchanged, an official of the Ministry wrote a letter in these terms to the parties concerned: "I confirm that an informal meeting has been arranged for 4 p.m. on Wednesday next, May 16, with Mr. H. R. Pollitzer in the chair, to discuss the above subject between representatives of your council, of the Ministry of Education and of the county council. The meeting will be held in Room 419 on the fourth floor of Chesham House." That meeting, under the chairmanship of Mr. Pollitzer, duly took place, and was attended by the town clerk and other officials of the plaintiffs, representatives of the county council, and two representatives of the Ministry of Education. No notice of the meeting was sent to the company and no representative attended the meeting on their behalf, and the case proceeded on the basis that the meeting was informal and was not intended to be a hearing under section 19 (5).

On May 21 the Minister issued his decision in a letter addressed to the county council. It was headed by the reference to the Town and Country Planning Act and then to the site, and in the first paragraph he referred to the purchase notice. In the second paragraph he stated: "The Minister is satisfied that the conditions specified in paragraphs (a) and (c) of subsection (1) to section 19 of the Act are fulfilled in the case of this land. He has given notice of his proposed action in accordance with subsection (5) of that section and no request for a hearing has been received by him and not withdrawn within the period prescribed by the notice. The Minister has decided, therefore, to confirm the purchase notice. At your council's request an informal meeting was, however, agreed upon with the two councils concerned and was held at this office on May 16, 1951. On behalf of your council it was stated that they wish to acquire the site, which has an existing use right, for educational purposes, and to erect upon it a primary school; they accordingly requested the Minister to modify the purchase notice by substitution of your council for Ealing Borough Council, on whom the notice was served. . . .

"The Minister has carefully considered all the facts and representations before him and the probable ultimate use of the land; having consulted with the Minister of Education, he is in no doubt that the site would be most appropriately used for school purposes, whereas the open space need of this area is not particularly urgent. He has decided, therefore, that he must

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“ accede to your council’s request. I am to inform you
“ accordingly that it appears to the Minister that it is expedient
“ to modify the purchase notice in relation to the whole of the
“ land to which it relates by substituting your council for the
“ Ealing Borough Council (on whom the notice was served); the
“ Minister directs accordingly that your council shall be deemed
“ to have served today a notice to treat in respect of the interest
“ of Messrs. Henry Boot & Sons Ltd. in the land in question.
“ This letter is issued as the Minister’s formal confirmation of
“ the above-mentioned purchase notice. Copies of it have been
“ sent to the Town Clerk of Ealing and to Messrs. Henry Boot &
“ Sons Ltd., the servers of the notice.”

The plaintiffs now challenged the Minister’s formal decision and by this action, the writ in which was issued on June 21, 1951, claimed (1) against the Minister and the county council a declaration that the Minister’s purported confirmation on May 21, 1951, of the notice of November 30, 1950, was ultra vires and void; and (2) against the Minister and the company a declaration (a) that the purchase notice was deemed to have been confirmed without modification on May 30, 1951, by subsection (3) of section 19; (b) that the plaintiffs were authorized to acquire the company’s interest in the land compulsorily in accordance with the provisions of Part IV of the Act.

Mitchison Q.C. and *G. D. Squibb* for the plaintiffs. The Minister’s letter of March 13, 1951, constituted “ notice of his “ proposed action,” the proposed action being to confirm the purchase notice without modification. That meant confirmation of the notice requiring the plaintiffs to purchase the land, which was the only confirmation within the Minister’s power. If, having sent the letter, the Minister changed his mind, as the event shows that he did, his proper course was not—as, by the letter of May 21, 1951, he purported to do—to confirm the purchase notice and to modify it by substituting the county council for the plaintiffs as purchasers, but to give a new “ notice of his proposed “ action.” That would have at least enabled the plaintiffs to ask for an opportunity of appearing before and being heard by a person appointed by him. As it was, the change of purchaser took the plaintiffs completely by surprise. After the meeting of May 16, 1951, the Minister changed his mind for reasons which seemed good to him, and it is not putting the matter too high to say that he ought to have communicated the change of circumstances

which led to his changing his mind to the plaintiffs before he purported to confirm the purchase notice subject to modification. True, his reasons were given in the purported confirmation, but then it was not possible for the plaintiffs to ask for an opportunity of being heard and of objecting to losing their position as purchasers. It is inherent in section 19, especially in subsection (5), that it was the duty of the Minister to disclose the change of circumstances which led him to change his mind. That is precisely the kind of situation for which the subsection provides. Indeed, it so states, for "any person or authority on whom that "notice is served" cannot have "an opportunity of appearing "before and being heard by a person appointed by the Minister "for the purpose" if there is presented to them as an accomplished fact—as there was here—the very action on the Minister's part about which they wish to be heard. This contention is supported by section 32 of the Interpretation Act, 1889, subsection (1) of which provides: "Where an Act passed after the "commencement of this Act . . . imposes a duty . . . the duty "shall be performed from time to time as occasion requires," and subsection (2): "Where an Act passed after the commencement of this Act . . . imposes a duty on the holder of an office, "as such . . . the duty shall be performed by the holder for the "time being of the office." It is supported also by *With v. O'Flanagan*,² in which Lord Wright M.R., having quoted from the judgment of Fry J. in *Davies v. London and Provincial Marine Insurance Co.*,³ from that of Fry L.J.—the same judge when a Lord Justice—in *In re Scottish Petroleum Co.*,⁴ and from that of Turner J. in *Traill v. Baring*,⁵ said: "In these cases . . . "the position is based upon the duty to communicate the change "of circumstances." Thus the purported confirmation by the Minister was ultra vires, i.e., there has not been any confirmation at all. Accordingly subsection (3) applies and the purchase notice, having been served on November 30, 1950, is to be "deemed to "be confirmed at the expiration of" six months from that date, i.e., on May 30, 1951, with the result that "the council on whom "the notice was served"—i.e., the plaintiffs—"shall be deemed "to be authorized to acquire the interest of the owner compulsorily. . . ." The court ought therefore to make the declarations claimed.

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² [1936] Ch. 575, 583.³ (1878) 8 Ch.D. 469, 474, 475.⁴ (1883) 23 Ch.D. 413, 438.⁵ (1864) 4 De G.J. & S. 318, 329.

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Christie Q.C. and *Denys Buckley* for the Minister. The Minister has done all that he is required to do. The confirmation was addressed to the county council and copies of it were sent to the plaintiffs and the company. The Minister confirmed the notice and modified it, so doing under subsection (2) (c). He could, had he thought proper, have decided either to grant, under subsection (2) (a), "permission for the development in respect "of which the application was made," or to direct, under subsection (2) (b), that permission be granted to carry out any other development for which permission ought to be granted, if any application be made for it. He did not take either course, but substituted the county council for the plaintiffs as purchasers, as he was quite entitled to do. On the true construction of section 19, the confirmation of a purchase notice is simply the confirmation of that notice as such; it is not necessary to mention in the confirmation the purchasing local authority. The Minister may replace one local authority by another, as he has done here. "Notice of his proposed action" is notice only of that action which, at the time of giving the notice, he proposes to take. He can, without notice to anyone, subsequently change his intention, at least by "substituting any other local authority for the council "on whom the notice is served," and need not give either of them an opportunity of being heard by a person appointed by him; for such a substitution is nothing more than a purely administrative exercise of his discretion. The declarations sought ought therefore not to be made.

Harold Williams Q.C. and *W. B. Harris* for the county council adopted the last argument.

D. P. Kerrigan for the company.

UPJOHN J. [after stating the facts and reading section 19]:—The position on May 21, 1951, when the Minister issued his purported confirmation, stood thus. On March 13, 1951, the Minister had given notice of his proposed action under section 19 (5) that he proposed to confirm the purchase notice without modification; there never was any effective notice given by any party in response to that notice, asking for an opportunity of appearing before and being heard by a person appointed by the Minister; there never was in fact such a hearing; and, after an informal meeting, which did not amount to such a hearing, the Minister purported to confirm the purchase notice, but modified it by making the county council the purchasing authority in lieu of the plaintiffs.

The bona fides of the Minister in making this decision is not in question. I have to determine simply whether in those circumstances the Minister made a valid order. For the plaintiffs it is submitted that, in giving notice of this proposed action to confirm the order, the Minister showed his intention to confirm the compulsory purchase by the plaintiffs. It was ultimately submitted on behalf of the plaintiffs that the words "without "modification" which were contained in the notice of proposed action carried the matter no further, for the purchase notice required, as it was bound to do under subsection (1), the plaintiffs to purchase the land, and therefore it was said such confirmation would confirm the whole of the purchase notice and would entitle and, indeed, bind, the plaintiffs to become the purchasers. There was no meeting under subsection (5), therefore it was said by the plaintiffs that the Minister could not alter his proposed action and was bound to do what he said he was proposing to do, and confirm the purchase notice in favour of the plaintiffs.

It was submitted that the Minister, if he had a changed intention after issuing his letter of March 13, ought, in accordance with what was said to be a fundamental principle of law, to have given a new notice of proposed action so that the parties affected could invoke subsection (5) if they desired. Section 32 of the Interpretation Act, 1889, was relied on, as were certain observations of Lord Wright M.R. in *With v. O'Flanagan*,⁶ although the latter observations were relied on entirely by way of illustration. It followed, if the Minister had not complied with the provisions of the subsection, then his decision was ultra vires and a nullity. On that, it was said to follow that the Minister made no valid confirmation within six months from the date of the purchase notice, and that therefore the provisions of subsection (3) of section 19 automatically come into play and confirm the notice in favour of the plaintiffs.

For the Minister, the argument (which was adopted on behalf of the county council) was as follows: it was said that the duty of the Minister was to confirm, on the one hand, or to take other action on the other hand. That meant that the Minister could confirm with or without modification under subsection (2) (c) on the one hand, or, on the other hand, take other action under subsection (2) (a) or subsection 2 (b), and that the duty of the Minister was directed essentially to the person giving the purchase notice. It was said that it was only as against the person giving

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the notice that the notice has to be confirmed, if the Minister decides that it is the right course to confirm rather than take alternative action under subsections (2) (a) or (2) (b). It was submitted that there was nothing in the section which compelled the Minister to confirm in the sense of naming the local authority which was to acquire or was bound to acquire the site; that, it was said, was a matter for subsequent administrative action by the Minister.

Then the argument proceeds that if the Minister decided to exercise his power by substituting the name of another local authority under subsection (2) (c), it was not necessary to give any notice thereof to any person or to give any person an opportunity of being heard by the person appointed by him for that purpose. It was submitted that the local authorities had no rights in the matter, and it was entirely a matter for the exercise of the discretion of the Minister. Then it was said that if the Minister gave notice of proposed action, that must be notice of his intention at the time at which he expressed his intention as to his proposed action and that there was nothing to prevent his subsequently altering that intention, at any rate to the extent of a modification under subsection (2) (c), without giving further notice to the local authorities, or affording them an opportunity of being heard should they desire to be heard. It was submitted that the Minister had strictly carried out the duties cast upon him by the section.

These respective contentions depend solely on the true construction of the section, but before going to a detailed consideration thereof one or two general observations are pertinent. This section constitutes a serious inroad into the liberty of the subject, including in that term bodies who, like local authorities, are not emanations of the Crown, for it enables a disappointed holder of land in certain circumstances to force a local authority to apply its public funds in the purchase of land. In this case there was some competition between local authorities to become the owner of the site, but in many instances the reverse would be the case. Local authorities may well be loth to have to pay possibly large sums for a site for which they have no use.

When, therefore, provision is made in the section for persons, including the affected local authorities, to appear before the Minister's representative in order to express their views, one would expect that to include a right for a local authority to make representations to the Minister on the question whether or not they should be compelled to purchase such a site. It would require clear

words in the section to empower the Minister to force a local authority to purchase a site without giving them an opportunity of making representations on so important a subject, yet that is precisely what the Minister argues that the section does, as he says that confirmation of the purchase notice need not designate the name of the acquiring authority. The converse is equally true; where the Minister confirms a purchase notice requiring a particular local authority to purchase land situate within their district, it would seem strange if he could, without any notice to that local authority, remove them from being in the position of purchaser and to substitute the local planning authority in their place, yet that is precisely what the Minister says he can do.

In my judgment, the section confers no such arbitrary and autocratic powers on the Minister. In my judgment, on the true construction of the section, if he merely confirms the purchase notice without express qualification, it means that he confirms the purchase notice which requires a particular named authority to purchase; he is confirming the purchase notice (which has to state the name of the purchasing authority) in whole and not in part. That seems to me only common sense, but it is supported by the phraseology in subsection (3), which says that the notice is to "be deemed to be confirmed." That plainly means in whole and not merely vis-à-vis the person giving the purchase notice. If the action proposed by the Minister involves the substitution of a local authority other than the authorities mentioned in subsection (5) (b) and (c), it is clear on reading subsection (5) (d) that the Minister must state in his notice of proposed action that he is proposing to exercise his powers under subsection (2) (c) by substituting another local authority. In my judgment, he must also do so if he is proposing to modify the purchase notice by substituting the planning authority for the local authority named in the purchase notice. The whole object of compelling the Minister to inform the parties mentioned in subsections (5) (a) to (d) of his proposed action is to enable each of the parties there named to know exactly where they stand in relation to the whole matter, so that they may consider whether to ask for an opportunity to appear before a person appointed by the Minister. The contrary argument that the Minister need not name the acquiring authority, so that the persons who have been served with notice of his proposed action do not know and have no opportunity of making representations to the Minister on the question which one of them is to be the purchasing authority, runs contrary to the whole object and tenor of the subsection.

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UPJOHN J. In my judgment, therefore, the Minister's notice of proposed action must state expressly or by necessary implication the name of the acquiring authority.

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In this case the notice, for the reasons I have given, did by necessary implication state the name of the plaintiffs as the acquiring authority. In this case there was no hearing under subsection (5). Is it, in such a case, open to the Minister to change his proposed action when he makes his confirming order? In my judgment, the Minister cannot change his mind and make an order which may vitally affect the local authorities concerned. To hold that he could do so would nullify the whole object of the subsection. It may be—though, as it is not necessary for my decision, I do not so decide—that, within the six months provided by subsection (3), the Minister might (before confirmation) change his mind and give a new notice of proposed action, and thereby revive the rights of the parties under subsection (5). What he cannot do is arbitrarily to change his mind and make an order without ever having given an opportunity to the parties to exercise their rights under subsection (5).

The Minister's purported confirmation of May 21, 1951, is, in my judgment, ultra vires and void. What has really happened in this case is that the Minister has, or his officials have, tried to short-circuit the provisions of the section by holding one of those interminable informal conferences so beloved of civil servants, in lieu of following strictly the provisions of the subsection, and I am glad to think that, so far as this court is concerned, that fails. I therefore propose to make a declaration that the purported confirmation dated May 21, 1951, by the Minister of the notice dated November 30, 1950, is ultra vires and void. It therefore follows that subsection (3) applies, because the period of six months from the date of the purchase notice expired on May 30, 1951. Therefore I shall also make the second declaration claimed. The Minister will pay the costs of the plaintiffs and of the company; I shall make no order as to the costs of the county council.

Judgment for plaintiffs.

Solicitors: *Field, Roscoe & Co., for Town Clerk, Ealing; Solicitor, Ministry of Health; G. W. Radcliffe; T. F. Peacock, Fisher, Chavasse & O'Meara.*

K. R. A. H.

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[1947 W. 1776.]

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The plaintiff brought an action against her two sisters claiming that a certain business was hers, alternatively she claimed that it was a partnership and asked for an account. Under an order made on motion a sum of cash said to be the sale price of the business was deposited in the joint names of the solicitors then acting for the parties.

Later the plaintiff retained the present applicant to act for her. When the action came to trial, it was held that she was a partner in the business, and an account was ordered on that footing. The plaintiff obtained certain advances on account of her share, and later she mortgaged the whole of her interest in the fund to a bank, the charge being arranged by the applicant. Subsequently the plaintiff and the defendants arranged a compromise, which among other things provided for the payment of various debts, but made no provision for the payment of the applicant's costs incurred in the action. By that time the applicant was no longer acting for the plaintiff. He applied for a charging order for his costs under section 69 of the Solicitors Act, 1932, on the fund held by the two solicitors:—

Held, (1) that the applicant was entitled to a charging order on the fund notwithstanding that he was not retained as solicitor by the plaintiff at the time when the funds were ordered to be retained. Dictum in *Clover v. Adams* (1881) 6 Q.B.D. 622, 624 not followed.

(2) That the fund was "recovered or preserved" by the applicant for the plaintiff within the meaning of section 69, and the fact that she received a judgment which was not that which she desired was irrelevant.

Hyde v. White [1933] P. 105 applied.

(3) That the quantum of any charging order was in the discretion of the court, and although a solicitor might be entitled to an order on the whole of a fund, in the present case the charging order would be confined to the interest of the plaintiff, since the interests of the defendants were not preserved by the activity of the applicant.

Jackson v. Smith (1884) 53 L.J.Ch. 972 and *Greer v. Young* (1882) 24 Ch.D. 545 considered.

(4) That the applicant's charge should rank in priority to the bank, as the bank must be taken to have notice that the solicitor had a statutory right to apply for a charging order for his costs, and they could not be heard to say that their charge was a bona fide purchase for value without notice within the meaning of

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section 69, but that the applicant was postponed to the proper debts of the partnership. *Pilcher v. Arden* (1877) 7 Ch.D. 318 considered.

(5) That the compromise arranged between the parties could not affect the applicant's rights to a charging order. *Twynam v. Porter* (1870) L.R. 11 Eq. 181 followed.

PROCEDURE SUMMONS.

By this summons a solicitor applied for a charging order under section 69 of the Solicitors Act, 1932.¹ The applicant was one of the solicitors employed by a plaintiff in the course of an action, judgment in which was given by Harman J. on July 11, 1950, after a hearing lasting seven days. The facts of the action, so far as relevant to the present summons, were as follows: A business was started by the plaintiff in London about March of 1939, under the name of Bubbles, or Bubbles Kiddies Frocks, the exact name being in controversy. In August, 1940, the plaintiff went to the United States of America, and the business then became dormant. It was restarted on December 4, 1941, by her sisters, the two defendants.

They restarted the business in conjunction with the plaintiff's husband, who had stayed behind, and one of the questions in the action was whether the plaintiff's husband was entitled to represent her for that purpose. The plaintiff returned to this country in July, 1945, where she found that the business was being run by her sisters. She claimed from the start that they were only doing it as agents for her and that it was her business. Family quarrels culminated in the issue of the writ in August, 1947. By the writ the plaintiff claimed that the business was hers; alternatively, that there had been a partnership in running this particular business since her return in August, 1945.

The defendants, although admitting that there was a partnership, immediately they were served with the writ, disposed of the business to their brother or a company controlled by him. The plaintiff, knowing that the business had been disposed of, launched a motion for a receiver, claiming a certain sum of money said to represent the purchase price. On the hearing of

¹ Solicitors Act, 1932, s. 69:
"Any court in which a solicitor has
"been employed to prosecute or
"defend any suit, matter or pro-
"ceeding may at any time declare
"the solicitor entitled to a charge on
"the property recovered or preserved
"through his instrumentality for his

"taxed costs in reference to that
"suit, matter or proceedings . . . all
"conveyances and acts done to defeat,
"or operating to defeat, that charge
"shall, except in the case of a con-
"veyance to a bona fide purchaser for
"value without notice, be void as
"against the solicitor:"

the motion in November, 1947, no order was made, on an undertaking by the defendants to lodge a sum of about £3,900 in the joint names of the plaintiff's and the defendants' solicitors, to await the trial of the action. The present application was for a charging order on the remains of that fund.

The plaintiff was at the time of the motion instructing a solicitor named Long, who was now before the court, because he was one of the people in whose name this money was lodged. For about two years after the motion nothing appeared to have been done in the action. In May of 1949, however, the plaintiff instructed the applicant, and the action came on for trial in July, 1950.

In the course of the action the plaintiff obtained leave to amend her pleadings, alleging that the defendants had been guilty of conversion in disposing of the business in the way that they had done. Harman J., in his judgment, held that the plaintiff's claim to be the sole owner of the business could not stand because her husband either had, or must be assumed to have had, authority to make the agreement which he did with her sisters, and that a partnership business between the plaintiff and her sisters starting in December, 1941, and ending at the date of the writ in August, 1947, must be presumed. The usual partnership account was ordered upon that basis.

In addition, the plaintiff obtained, by reason of the wrongful acts of her sisters, an order for an account of moneys received, or which, but for their wilful default, ought to have been received by her sisters on the disposal of the business, it being alleged that they disposed of it to their brother's company at a gross undervalue. The costs were ordered to be taxed and paid out of the assets, the plaintiff's costs being taxed eventually at £767 odd.

The plaintiff obtained from time to time certain advances amounting to some £600 out of the fund on account of what was supposed to be her share. She was, however, still in debt, and in February, 1951, she mortgaged her share and interest in the fund to Barclays Bank Ltd.

The inquiry into the partnership accounts before the Master lasted a number of days, and there was considerable cross-examination of the witnesses and heated discussion. The Master said that he was not prepared to give judgment without the shorthand notes of all the proceedings and further consideration; but intimated to the parties informally that, as he was then

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advised, he thought that the defendants would have to find a further £1,200 as the purchase price of the business.

The business had made considerable profits in 1945, 1946 and 1947, but no taxes had ever been paid. A considerable sum was therefore due to the Crown. By January of 1952 that sum was agreed at £1,660. That took into account, as against each sister, the amount of her personal allowances. Subsequently the plaintiff and defendants came to a compromise which caused the fund to disappear. This agreement between the parties appeared to have been made on April 1, 1952, and was to this effect: "The plaintiff withdraws all claims and allegations against the defendants. The defendants withdraw all claims and allegations against the plaintiff. The plaintiff withdraws all claims and actions against the following persons"—they were a number of members of the family. The agreement continued: "Each of the parties agrees to pay their own costs. The plaintiff shall be entitled to the whole of the partnership fixtures and fittings and plant now stored at 27 Daventry Street, London. The parties agree that all the proper liabilities of the partnership shall be paid forthwith and instructions issued to Messrs. E. C. Randall and L. E. Long to deal with the moneys deposited in their joint names in the following manner: To pay the income tax liability on the profits of the partnership to the Inland Revenue at the full standard rate, each partner to make a personal reclaim for any allowances which may be due to her. To pay the sum of £200 to Gerald Julius Fine. To pay the proper accountancy charges and fees due to Messrs. H. S. Rubin & Co. [alleged partnership debts], and to pay any other liabilities of the partnership. Any balance remaining after payment of the above items to be paid to the three partners in equal proportions."

On May 1, 1952, Mr. Randall wrote to the applicant, who had by then been discharged by the plaintiff from acting as her solicitor, and said this: "Our respective clients have met and agreed terms of settlement in writing, a copy of which I enclose. I also enclose copy authority to Mr. Long and myself for payments to be made out of the joint account. I have sent a copy of the authority to Mr. Long, together with cheques for his signature as follows: Inland Revenue, £2,663 2s. Od.; G. J. Fine, £200; H. S. Rubin & Co. . . ." It was also proposed to pay £131 5s. to one of the defendants, and £106 each to the other defendant and the plaintiff. That caused the whole fund

to be dissipated. The sum of £2,663 was not due to the Inland Revenue, that sum having been agreed at £1,660 three months before. The object of swelling the amount alleged to be due to the Inland Revenue appeared to have been to make the fund disappear, and enable the sisters afterwards to recover something individually from the Inland Revenue, which would not be a part of the fund.

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On May 8, 1952, the applicant took out this summons. He stated in his affidavit that when he was first instructed he relied on the fact that there was nearly £4,000 in the joint names of two solicitors, of which his client was entitled to a third, subject to costs, and to the debts of the partnership. The business had been wound up and the fund represented the proceeds of sale, and it seemed unlikely that there would be other creditors.

The charging order was opposed by the plaintiff; by the defendants, the plaintiff's two sisters; and also by Barclays Bank Ltd., the plaintiff's mortgagee; the Inland Revenue, representing creditors of the partnership; Mr. Long, who submitted that he would act as the court directed; and Mr. Randall, the defendants' solicitor.

Harry Lester for the applicant solicitor.

Edwards Q.C. and *E. M. Winterbotham* for the defendants.

F. D. Macintyre for the plaintiff.

W. A. Bagnall for the Inland Revenue.

C. R. D. Richmond for Barclays Bank Ltd.

J. P. Hunter-Brown for Mr. L. E. Long.

Cur. adv. vult.

July 31. HARMAN J., after stating the facts, said:—The first point taken is that this money was not recovered or preserved in the action. It is said that the whole point of the action was to recover the whole of the business as being the plaintiff's business. It will be remembered, nevertheless, that the plaintiff did ask in the alternative for accounts on the footing that there was a partnership. The money in the hands of the two solicitors must be treated as equivalent to money which had been paid into court to the credit of the suit to abide its result; there can be no other reason for an undertaking to pay it into joint names in this way. It saves the expense of having a receiver and the trouble of a petition for payment out of court,

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but in other respects the money must be in the same position as though it had been paid into court to the credit of the suit.

The object of the suit, it is true, was to obtain the whole of this money for the plaintiff; in the upshot she became entitled to only part of it. Nevertheless, the fund in question was put into safe custody in this way to abide the suit's result and, it seems to me, in the words in section 69 of the Act, to have been "recovered or preserved." The fact that the plaintiff got an answer which was not welcome to her does not seem to me to be relevant, because it is clear, for instance, from *Hyde v. White*,² that money can be recovered or preserved, notwithstanding such a result.

That was a striking case and the headnote is this: "A party "to a probate action propounded several wills of the deceased, "being also interested as next-of-kin in the event of the intestacy "of the deceased. The court pronounced for an intestacy and "against the wills"—in other words, the plaintiff got exactly what she did not want—"On the application of solicitors who "had conducted the litigation for the party propounding the "wills, and had since been discharged, the court made an order "declaring them entitled to a charge for their costs upon the "interest of their client in the intestacy as upon 'property "'recovered or preserved through their instrumentality.'" Lord Merrivale P. said that it did not matter that they had been discharged, and I do not think anybody would question that. He said³: "The real question is whether the section gives a "charge on the interest of the plaintiff which has now been "ascertained, and whether there is such a charge by reason that "that interest is property which has been recovered or preserved "through the instrumentality of her solicitors. If one takes a "superficial view it can be said that the plaintiff has been "unsuccessful in the claim she made under any of the wills. "It may be said, therefore, that since she has failed all along "the line there has been no property preserved or recovered. "On the whole I do not think that this is the true view. The "statute must be construed with reference to various classes of "litigation."

Then he said that in the Probate Court the result, although unwelcome to the plaintiff, was one which gave her something, which was, therefore, something "recovered or preserved." That

² [1933] P. 105.

³ Ibid. 107.

was a stronger case than the present because here the plaintiff did make an alternative claim to a partnership.

This point was also considered in *In re Turner*.⁴ In that case, the result of the intervention by the plaintiff was disastrous for the estate. A profitable business had been carried on, it was shut down and there was not enough for anybody. Kekewich J., nevertheless, said that if there were anything, it had been recovered or preserved, although the action was disastrous. He said this⁵: "It is extremely difficult to say what is meant by 'preserved,' but there is one case which gives me a few words which seem to me to be applicable. I do not quote them as a whole, and I see that there is some difficulty in applying the passage in its entirety to this or any other case, but Wickens V.-C. in *Baile v. Baile*⁶ speaks of a property being preserved when it 'is managed and retained for the rightful owner,' and adds, 'instead of being left to the first comer,' which addition seems to imply the danger which he indicated in the other examples he had previously given, namely, of an estate preserved against an adverse claimant, and of an estate preserved by keeping a sea wall in repair . . . Still, I think I may take those words as giving me a guide as to what comes within the word 'preserved.' This property has been managed and retained."

This money has been retained and, I suppose, managed to that extent by the solicitors in whose hands it is, and, therefore, I think that the answer to the question whether anything had been recovered or preserved is in the affirmative.

Secondly, it is said that if anything was recovered or preserved it was not through the instrumentality of this solicitor, and the reason given is this, that the money was paid in on a motion launched in 1947 and that this solicitor was not retained until 1949. If he had been retained before the motion was launched, it seems to me that the law is settled because the common form of order in a partnership suit, which appears in Seton, Judgments, Orders and Decrees, 7th ed., vol. 2, p. 1044, would clearly give it to him on the footing that it is a fund in court. Declaration number 6 on that page is: "Declare that the applicant, as the solicitor lately employed by the plaintiff in the prosecution of this action, is entitled to a charge upon the sum in court . . . for the taxed costs . . ." That seems to me to show that he

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⁴ [1907] 2 Ch. 126.

⁶ (1872) L.R. 13 Eq. 497, 508.

⁵ *Ibid.* 131, 132.

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would be entitled to a charge if he had been there when the money was lodged in the joint names, although he ceased to be solicitor when the action was brought to fruition.

But it is said that the converse does not follow because nothing more was got in. The plaintiff's solicitor had no right to oblige her to complete the inquiry and to recover the extra £1,200 which the master indicated might be due. The solicitor always runs that risk, and it is said that nothing more was got in and everything had been done, and it was all over. In my judgment that is not right. The solicitor who has prosecuted the action to the conclusion of the judgment, which declared what were the rights of the plaintiff in this fund, is entitled to say that such interest as she takes has been recovered through his instrumentality.

There is an observation of Grove J. in *Clover v. Adams*,⁷ which throws some light on this proposition. I do not think I need trouble with the facts. It was a former solicitor who was applying for the charging order, and Grove J. says this⁸: "The solicitor 'must be one who is 'employed to prosecute or defend any 'suit.''" This was under the older Act, but the words for the present purposes are the same. "Those words do not import that 'the solicitor must be the solicitor at the time when he makes the 'application. The words 'shall be employed' are not used in 'the future tense; the use is conditional; they do not tie one 'down to any particular time. If indeed at the time the money 'was paid into court he was not the solicitor, there might be 'a strong and perhaps a conclusive argument against him, but 'here the applicant was the solicitor at the time the money was 'paid into court." That, of course, is a mere obiter dictum, saying that something might be so. It seems to me, now that I have considered the matter carefully, that it cannot matter that the solicitor who applies is not the solicitor who happened to be employed at the moment when a particular stage was reached and some money was paid into court or some receiver was appointed.

It is clear from *Jackson v. Smith*,⁹ on which the form of order in Seton is founded, that there can be a charge in a partnership action over the whole, not only over the plaintiff's or defendant's, interest in the fund. The basis of the decision of Kay J., in that case, seems to have been that this was a kind of salvage right,

⁷ (1881) 6 Q.B.D. 622.

⁹ (1884) 53 L.J.Ch. 972.

⁸ Ibid. 624.

that the fund has come into harbour, so to speak, through the activity of the solicitor, and that he can, therefore, have a charge against the whole of it. Kay J. said this¹⁰: "It has been decided again and again, and in the case of *Greer v. Young*¹¹ the decisions were completely adopted by the Court of Appeal, that the solicitor whose exertions did really recover the fund has a right to have a charge on the fund itself, and not merely on the interest of the person who employed him. Cotton L.J. says¹²: "Undoubtedly the quantum of the interest of the person who employed the solicitor is an important element of consideration. It is, generally speaking, the interest of the plaintiff or the defendant which is recovered in the action, and, to determine whether a fund has been recovered in the action, it is material to consider what is the interest of the plaintiff, or defendant. But to say that the court has only power to charge the interest of the plaintiff or the defendant would be to repeal the Act.' That means that the court has power to charge the fund as against everybody interested, provided, of course, it has got those persons before it—and when you look at the reason of the thing I think it is plain that it must be so. The principle adopted, taking the language used in one of the judgments, as the ground of making the charge, is that the property has been recovered or preserved, and therefore the charge is in the nature of salvage, and accordingly the solicitor who applies for such a charge is in this position: he says, 'But for my exertions the property might never have been realized at all.'"

Of course, that only applies, as it were, by a side wind to this solicitor, because he was not there when the money was paid to the solicitors. Nevertheless, it was through him and his prosecution of the action that the money was retained in the joint names of the solicitors as it remains today. *In re Wadsworth*,¹³ shows that a solicitor may be entitled to a charging order though he has been discharged before the trial of the action comes on. Consequently, I do not think that the doubts of Grove J. ought to prevail over my own views in that matter.

Thirdly, and the passage which I have cited leads to this, on what is it that this solicitor is to have a charge? In a simple partnership suit the principle is that of salvage and the charge is on the entire fund. The authority for that was in the passage

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¹⁰ 53 L.J.Ch. 972, 975.

¹¹ (1882) 24 Ch.D. 545.

¹² Ibid. 555.

¹³ (1885) 29 Ch.D. 517.

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which I have cited already in *Greer v. Young*.¹⁴ Nevertheless, there is a discretion, as the section shows. It is merely a discretionary power.

Fourthly, is the solicitor to be ahead of the creditors of the partnership? Undoubtedly in a partnership suit he may be so, and the form of order followed by Bennett J. recently in *Kay v. Lovell*,¹⁵ shows that the common form of order puts the solicitor who obtains the charge ahead of the creditors of the persons having an interest in the fund. That is not always so. Morton J., for instance, in an administration suit in *In re Clayton*¹⁶ took a different view, but, of course, an administration action is much more concerned with the creditors of the deceased than a partnership action is concerned with the creditors of the partnership, and that may be the difference between them.

Fifthly, does the charging order put the solicitor ahead of mortgagees of the plaintiff's interest? The answer to that, I think, is yes, except in special circumstances. The section covers the point, because it provides that all conveyances operating to defeat that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void.

It is said in this case, that although that may be so, there are special circumstances why here it should not prevail. The reason given is that the applicant himself arranged this charge with Barclays Bank and did not suggest to the bank at the time that he was looking to this fund and expected to have a charge on it for his costs. It seems to me that that argument cannot be right. Every mortgagee of a fund, either in court or in joint names like this, with an action pending, as the bank knew it was pending, must be taken to have notice that the solicitors to any of the parties may have a statutory right to apply to the court for a charging order. They cannot say that it is a purchase for value without notice, nor does it seem to me that the mere arranging of a charge on the plaintiff's interest by the applicant was tantamount to a representation by him that he did not look to the usual rights of a solicitor for his charge.

A somewhat similar attempt was made in *Pilcher v. Arden*.¹⁷ That was an administration suit. It was held that B. was entitled to a charging order on the interest of his client in the funds in court, notwithstanding a certain prior order for payment

¹⁴ 24 Ch.D. 545, 555.

¹⁵ [1940] Ch. 650.

¹⁶ [1940] Ch. 539.

¹⁷ (1877) 7 Ch.D. 318, 320.

out, and the fact that the plaintiff had in the meantime assigned his interest with the knowledge of B.—that was the solicitor—made no difference. Bacon V.-C. says this ¹⁷: “But the statute “has given to the solicitor a right to call for a charge whenever “he thinks fit for the taxed costs, charges, and expenses of or “in reference to the suit, matter, or proceeding. Nothing can “be said against such an enactment as this, but by a purchaser “for valuable consideration without notice. In this instance “the Reversionary Society had full notice”—those are the persons to whom B. with the knowledge of the solicitor had charged his interest—“Therefore the circumstance of this purchase having been made does not impeach the right of the “solicitor to have his charge. Although I am not bound, it is “true, by the decision in *Twynam v. Porter*,¹⁸ which has been “cited to me, I am very willing to be guided by it. This is not “a question of propriety, it is a question of whether the inherent “right of the solicitor to have a charge for his costs is to prevail “over that of a purchaser.” The Reversionary Society there had not taken a charge; they had purchased the interest. Nevertheless, the solicitor was held to be ahead, and the judge made an order, to which I need not refer, in the form of *Twynam v. Porter*.¹⁸

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A further point is raised which does bring up *Twynam v. Porter*,¹⁸ and that is that the compromise cannot defeat the solicitor's rights. That is clear enough on the section itself, but there are two cases which show it very clearly, and one of them is *Twynam v. Porter*,¹⁸ which has a certain resemblance to this. The headnote is: “In a suit by a cestui que trust against a “trustee of landed estate, praying for an account and reconveyance, a receiver was ordered to be, and afterwards was, “appointed, adversely to the defendant. Notice of motion for “decree was served, but before the time for closing evidence “had arrived, the plaintiff, without consulting her solicitor, and “without his knowledge, entered into an agreement with the “defendant for a compromise of the suit on the terms, first, that “a sum of cash should be paid to the plaintiff, then, that the “mortgages on the property should be paid off, and then, that “the costs of all parties estimated at a fixed sum should be paid, “Upon hearing of the compromise, the plaintiff's solicitor “applied to the plaintiff and to the defendant's solicitors for the

¹⁷ (1877) 7 Ch.D. 318, 320.¹⁸ (1870) L.R. 11 Eq. 181.

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“ terms of it, but was refused all information. Upon petition
“ under the Solicitor’s Act:—*Held*, that the solicitor was entitled
“ to a first charge for the amount of his taxed costs, as between
“ solicitor and client, upon the property of the plaintiff, as having
“ been recovered and preserved through his instrumentality.”
Counsel in argument said this¹⁹: “ The intention of the parties
“ was to exhaust the estate, to postpone payment of the
“ petitioners, and to fix an amount for payment of the costs.”
The Vice-Chancellor accepted that view. He said that a certain
sum was effectively preserved²⁰: “ If that be so, it cannot signify
“ in the slightest degree what the terms of the compromise were.
“ Whether they were binding on the parties is wholly unim-
“ portant, because the right of the petitioners to have, out of the
“ property protected and preserved, payment of the costs which
“ have been incurred for the benefit of the plaintiff is a claim
“ paramount to any title which can be asserted under the com-
“ promise, whatever it may be.”

Similarly, in *Moxon v. Sheppard*,²¹ there was a collusive compromise which would have defeated the solicitor.

This being, as I think, the legal position, and a discretion residing in me, what ought I to do in justice in a case of this kind? I must have regard to the fact, so far as the plaintiff is concerned, that what she eventually got was something that she might possibly have had before the action started, and that she was offered in the defence to be treated as a partner. The defendants largely belied that offer by their devastavit in selling the business without her consent or knowledge at what appears on the face of it to have been an undervalue. Nevertheless, her claim largely failed. I do not think that in the circumstances it would be right to give her solicitor a charge over the defendant’s interests in the fund, for those interests were not preserved to her by the action. All that was preserved was her interest, and, it seems to me that, as in *Hyde v. White*,²² the case which I first cited, the charge ought to be limited to her interest. If that be so, it seems to me that the charge must also be subject to the interest of the partnership creditors. If I put the charge in front of them, the result may be to make the other partners pay her debts.

The question remains: What are the proper debts of the partnership? There is the debt due to the Crown, which is

¹⁹ L.R. 11 Eq. 181, 185.

²⁰ *Ibid.* 187.

²¹ (1890) 24 Q.B.D. 627.

²² [1933] P. 105.

ascertained. There are said to be two others, and these, though admitted by the plaintiff and her sisters, are debts to members of the family and obviously suspect. If they are not withdrawn or admitted, there must be an inquiry as to the partnership debts.

That brings me to the position of the bank. In my judgment, the bank have no right to come ahead of the solicitor, and the solicitor's charge must rank in priority to the bank as mortgagee.

This being the result, the application to some extent fails. It fails, I think, so far as it was an attempt to get ahead of the partnership creditors, and I shall order the applicant to pay the costs of the Crown who represent those creditors. As to the other parties, I do not propose to give them any costs. The mortgagees, because they have failed in making the point which they tried to make, and the defendants, in order to mark my disapprobation of the scurvy trick by which they tried to defeat the rights of their creditors, whether solicitors or not.

Consequently, I shall declare that the applicant is entitled to a charge on the interest of the plaintiff in the fund in priority to any chargees or mortgagees of that interest, but subject to the payment of the creditors of the partnership, and I direct an inquiry as to who such creditors are, if necessary. Except as already stated, there will be no order as to costs.

Order accordingly.

Solicitors: *Charles Caplin & Co.; E. C. Randall; Ernest W. Long & Co.; Durrant Cooper & Hambling; Philip Conway, Thomas & Co.; Solicitor of Inland Revenue.*

I. G. R. M.

In re F. T. HAWKINS & CO. LD.

[00648 of 1950.]

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Company—Winding up—Clerk to liquidator's solicitors also member of committee of inspection—Disallowance of payment of profits charged out of assets—Companies (Winding-up) Rules, 1949 (S.I. 1949, No. 330), r. 163.

On the taxation of costs of the solicitors appointed to the liquidator by a resolution of the committee of inspection in the winding-up proceedings of a company, the taxing officer disallowed all profit charges, because one member of the committee

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of inspection was in the employment of the liquidator's solicitors as their managing clerk. On a summons taken out by the liquidator for a review of the taxation:—

Held, that the summons must be dismissed, for while the position disclosed was not infrequent, and all parties had acted in good faith, such a practice was within the mischief of Rule 163 of the Companies (Winding-Up) Rules, 1949, as it necessarily involved a conflict between interest and duty.

Dictum of Lord Esher M.R. in *In re Gallard* [1896] 1 Q.B. 68, 71 followed.

SUMMONS in chambers (reported by leave of Wynn-Parry J.).

On the taxation of the costs of the solicitors to the liquidator, in the winding-up proceedings of a company, the taxing officer disallowed all profit charges, because one of the members of the committee of inspection was employed by the liquidator's solicitors as their managing clerk. The taxing officer disallowed these charges on the ground that the case came within the provisions of rule 163 of the Companies (Winding-up) Rules, 1949, which provides that: "No member of a committee of inspection shall, "except under and with the sanction of the court, directly or "indirectly, by himself, or any employer, partner, clerk, agent, "or servant, be entitled to derive any profit from any transaction "arising out of the winding up or to receive out of the assets any "payment for services rendered by him in connexion with the "administration of the assets or for any goods supplied by him "to the liquidator for or on account of the company."

A summons was taken out by the liquidator "for an order "that the taxation of costs of the solicitors to the liquidator "appointed by a resolution of the committee of inspection dated "January 3, 1951, be reviewed and that the objections made by "the liquidator's solicitors to the disallowance of the several "items specified in the said objections be allowed."

C. R. D. Richmond for the applicant.

Denys Buckley for the Board of Trade.

WYNN-PARRY J. read the summons, and continued:—The relevant facts are few, and can be very shortly stated. The solicitors were appointed solicitors to the liquidator in January, 1951, by a resolution of the committee of inspection, and a member of that committee was a clerk in the employ of those solicitors. I am told that it was at the request of the petitioning creditor that this clerk was nominated to the committee, the

petitioner in question residing at a considerable distance from London; and I desire to make it clear that the most that can be said against the liquidator and the firm of solicitors is that, to use the words of Lord Esher M.R. in *In re Gallard*,¹ they made a mistake in allowing themselves to be retained by the committee of which a clerk in their employ was a member; and that if they desired to accept that retainer, the clerk ought to have resigned from the committee; but I make no imputation whatsoever against their bona fides in the matter.

The rule under which this application is brought is rule 163 of the Companies (Winding-up) Rules of 1949. [His Lordship read the material part of the rule and continued:] The then corresponding rule in bankruptcy (which was in similar language) was considered in *In re Gallard*.¹ In that case the point which was the subject of the actual decision was different from that which is raised in this summons. There the trustee in bankruptcy, with the permission of the committee of inspection, appointed Messrs. Ashurst, Morris & Co. to be solicitors to the trustee in bankruptcy. One of the members of the committee was a Mr. Hunt, who was a managing clerk of Messrs. Ashurst, Morris & Co.; another member was a Mr. Williams, a solicitor at Brighton. Messrs. Ashurst, Morris & Co. employed Mr. Williams as their agent in some proceedings in the bankruptcy taken at Brighton. No prior sanction of the court to his employment had been obtained. A bill of costs was delivered by Messrs. Ashurst, Morris & Co. which included a sum for the costs of Mr. Williams. The taxing master, acting under rule 317 of the Bankruptcy Rules, 1886, disallowed the whole of this sum except a small sum for disbursements out of pocket, holding that the remainder represented the profits derived by Mr. Williams from the business.

Vaughan Williams J. held that Mr. Williams was also entitled to an allowance for the proportion of his office expenses (such as clerks' salaries, rent, etc.) attributable to the particular business, and he disallowed only the sum of £40 as representing the profit derived by Mr. Williams from the business, allowing therefore a substantial sum out of the amount which the taxing master had disallowed.

The matter was taken to the Court of Appeal, and the decision in that court turned on the question how a solicitor's profit costs should be calculated; and, as I say, the actual decision does not touch the point which I have to decide in this case. But Lord

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¹ [1896] 1 Q.B. 68.

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Esher M.R., delivering a judgment reversing the judgment of Vaughan Williams J. on the point before the court, proceeded to add this ²: "I desire to add that this case appears to me to raise even a larger question than that which has been brought before us. Messrs. Ashurst, Morris & Co. (I say again without any wrong intention) accepted a retainer from a committee of inspection one member of which was their own clerk. In my opinion that was not good practice, and I think they made a mistake in so doing. I think that under the circumstances they ought, at least, to have obtained the sanction of the court before they accepted the retainer. In my view, if a solicitor accepts a retainer when a member of a committee of inspection stands to him in the relation in which one of the committee stood here, and an application were made to the court of bankruptcy immediately to set aside and disallow that retainer, the inherent power of the court ought to be exercised in setting it aside."

It is true that that paragraph represents nothing but an obiter dictum, but it is an obiter dictum to which the greatest respect is due, and it is one which has been before the profession since the year 1896, when the judgment was delivered. So far as the researches of counsel have been able to ascertain, it has met with no criticism whatsoever, and in my respectful view it enunciates a proposition the propriety of which is beyond dispute. It frowns in no uncertain terms on the practice which was, I say again, in all good faith, followed in this case. It is a practice which, in my view, ought to be discontinued as soon as possible; and it is as much for that reason as any other that I have desired to give a reasoned judgment on this summons. The basis of that obiter dictum is clearly that, if the practice is followed, there must result a conflict between interest and duty, a conflict which this court, if possible, never allows to arise.

It is to be observed that Lord Esher carries his view so far as to say that, under the inherent power of the court, if an application had been made to disallow the retainer, the court ought to have exercised it in setting aside that retainer. In this case, who could be expected to do it? The liquidator shared the same view as the committee of inspection. It was that committee which appointed the firm of solicitors, and there appears to me to have been no one who could have been expected in the circumstances to take the course which Lord Esher indicates would have been possible.

² [1896] 1 Q.B. 68, 71.

It is against this background that I have to consider rule 163, and in considering the language of that rule I propose to be as astute as I can to bring the present case within the mischief of that rule, as it is so clearly within the mischief of the last concluding paragraph of the judgment of Lord Esher. To return to that rule, it opens by saying: "No member of a committee of inspection shall, except under and with the sanction of the "court"—which admittedly was not obtained in this case—"directly or indirectly, by himself, or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from "any transaction arising out of the winding up." As has been stated by Mr. Buckley, at first sight the presence of the employer in that list of persons is somewhat strange, but I think that when the character of the other persons mentioned in that list is considered, and when it is appreciated also that the phrase is introduced by the preposition "by" and not by the preposition "through," the proper way of construing the phrase is to treat the word "by" as equivalent to the phrase "in the person of," and the rule therefore is satisfied if through the activities of the member of the committee his employer makes a profit.

But, alternatively, if that construction be wrong, I should be prepared—construing this rule, as I frankly intend to do, as strictly as I can against the applicant—to say that no doubt in a very indirect way the member of the committee, being an employee of the solicitor who has derived the profit, must be said to have derived some part, however indefinable, of that profit made by his employer. If he were employed on a commission basis, clearly the matter would be beyond argument. It is said that he escapes from the mischief of this rule, and that therefore his employer, the solicitor, escapes from its mischief, because the employee is not remunerated by commission, but receives a flat rate of payment. But, as a result of the transaction, the funds of the employer with which he is enabled to pay the employee are swollen, and, as an alternative view, I think that would be sufficient to cover the case.

For those reasons, therefore, I propose to refuse this summons. I am told that the position which has been disclosed in the summons is not by any means infrequent, and, as I have said, I acquit the solicitors and the liquidator and the committee of inspection of anything more than a mistake. In those circumstances, I think the proper order as to costs would be that the liquidator shall pay the costs of the official receiver, who appeared

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in this court to argue the case against the claim. The liquidator may recover those costs and his own costs out of the assets.

Summons dismissed.

Solicitors: *Lesser, Fairbank & Co.; Solicitor, Board of Trade.*

J. L. D.

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In re SPENSLEY'S WILL TRUSTS.
BARCLAYS BANK LD. *v.* STAUGHTON AND OTHERS.

[1951 S. No. 317.]

Will—Charitable trusts—Bequest if prior gifts renounced “for some purpose in connexion with Australia as the . . . National Trust and my sister . . . may jointly decide . . .”—Whether general charitable intent.

Will—Codicil—Revocation of gift—Substitutional gift—Scope of revocation—Power of appointment.

A testator by clause 12 of his will bequeathed a house, subject to a life interest, to his niece, M.B. for life and “after her death . . . for such child or children of the said M.B. who may attain “21 years as she may appoint or failing such appointment then “for the first or other son of the said M.B. who first attains . . . “21 years . . .” By clause 13 he bequeathed the contents of the house subject to a prior life interest, to M.B. absolutely.

By clause 14 he bequeathed an estate to the National Trust on trust for his two sisters for their lives successively, and then for the use of the High Commissioner or other person representing the Government of Australia as a country residence. He directed that if the Government of Australia should refuse this bequest “then for such other uses preferably for some purpose “in connexion with Australia as the . . . National Trust and my “sister . . . if then alive may jointly decide or if . . . [the sister] “be not then alive as the . . . National Trust may decide. . . .” By clause 15 the contents of the house on the estate were bequeathed to the National Trust on the same trusts as the estate.

By a codicil executed shortly before his death the testator provided: “I hereby revoke all provisions in my said will for my said “niece M.B. and I direct that my said will is to be read as if the “name of my said niece did not occur therein.” He gave a substitutional gift to be added to another trust fund “for the “benefit of the said M.B. and her issue. . . .”

The National Trust renounced the trusts, and the Government of Australia disclaimed the gifts.

M.B. was unmarried at the date of the will but at the date of the hearing was married and had issue:—

Held, (1) that the trusts created by clauses 14 and 15 in the will were valid charitable trusts, and that a scheme should be brought in for the application of the money. *In re Flinn* [1942] Ch. 241 applied.

(2) That the codicil was only effective to revoke the interests of M.B. under the will and not those of her children, but that her power of appointment ceased to be exercisable and the gift over in default of appointment for her first son to attain the age of 21 years took effect.

In re Wray [1951] Ch. 425 and *In re Brough* (1888) 38 Ch.D. 456 followed.

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Howard Spensley made his will on March 24, 1932. By clause 12 he bequeathed a house in Knightsbridge, London, to his trustees to allow his sister to have the use of it for her life, and "after her death for my niece Marie Brignoli for life and after her death . . . for such child or children of the said Marie Brignoli who may attain 21 years as she may appoint or failing such appointment then for the first or other son of the said Marie Brignoli who first attains the age of 21 years. . . ."

By clause 13 he bequeathed the furniture, pictures and contents of that house to his sister for life, to "use and enjoy the same in connexion with the said house . . . and subject thereto I bequeath the same to my niece Marie Brignoli on her attaining the age of 21 years absolutely. Should . . . Marie Brignoli die before attaining the age of 21 years then subject to the life interest of my sister . . . to form part of my residuary estate."

By clause 14 he devised and bequeathed his estate at Westoning to the National Trust for Places of Historic or Natural Beauty upon the following trusts: for his two sisters for their lives successively, and after the death of both his sisters "for the use of the High Commissioner or other person representing the Government of Australia in England for the time being to be used by him as a country residence in a way similar to that in which Chequers is used by the Prime Minister of England. Should the Government of the Commonwealth of Australia refuse this bequest at the time of my death or renounce it at any future date then for such other uses preferably for some purpose in connexion with Australia as the said National Trust and my sister . . . if then alive may jointly decide or if . . . [the sister] be not then alive, as the said

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" National Trust may decide, but so that the said estate of
" Westoning may as far as possible be kept intact. . . ."

By clause 15 he bequeathed the furniture and contents of the house at Westoning to the National Trust to be used in connexion with the house and to follow the trusts created in respect of the estate.

The testator executed a codicil to his will on February 26, 1938, which, so far as relevant, provided: " I hereby revoke all provisions made in my said will for my said niece Marie Brignoli and I direct that my said will is to be read as if the name of my said niece Marie Brignoli did not occur therein. In lieu thereof I bequeath the sum of £2,000 to be added to the trust fund of £8,000 created by the will of my mother . . . for the benefit of the said Marie Brignoli and her issue, the said £2,000 to be an addition to the said £8,000 and to be held on the same trusts. . . ."

Marie Brignoli was unmarried at that date, but was now married and had issue. The testator died on March 3, 1938. On July 11, 1938, the National Trust renounced the office of trustee under the will. On September 3, 1938, the High Commissioner for Australia on behalf of the Government of Australia and on behalf of himself disclaimed all devises or bequests made to the Government of Australia under this will. The first tenant for life, as tenant for life, sold the Westoning Estate, and the furniture and contents of the house, which was now represented by a fund of £9,400.

The questions on the summons relevant to this report were: (1) Whether on the true construction of the will, and in the events which had happened, the trusts contained in clauses 14 and 15 of the will concerning the Westoning Estate and the contents of the Manor House at Westoning subject to the life interests of the testator's two sisters had failed or were valid charitable trusts; (2) whether the effect of the codicil was to revoke the trusts in the will for the benefit of the children of Marie Brignoli and the power of appointment conferred on her by the will.

H. Hillaby for the plaintiffs, Barclays Bank Ltd., one of the trustees of the will.

Denys Buckley for the Attorney-General. The will shows a general charitable intention. A similar position existed in *In re Flinn*.¹ It was stated there that where property is given to a

¹ [1948] Ch. 241.

person by virtue of his office which has charitable activities connected with it, in circumstances in which he takes not beneficially but as trustee, a general charitable intention will be inferred from the character of the trustee. That principle is of general application. Accordingly this is a valid charitable trust which ought to be carried into effect notwithstanding that the property has been sold.

Pascoe Hayward Q.C. and *Nigel Warren* for Marie Brignoli (now Marie Gluckman) and her two younger sons. There is no general charitable intent. The argument on behalf of the Attorney-General involves an unwarrantable extension of *In re Flinn*.¹ Jenkins J. said in that case² that the words in the will should not be given effect so as to enlarge the gift beyond the purposes of the trustee's office; the testatrix here has shown an intention to enlarge the gift beyond the purposes of the National Trust, therefore *In re Flinn*³ is distinguishable.

Pennycuick Q.C. and *E. Blanshard Stamp* for a nephew of the testatrix adopted the arguments of *Pascoe Hayward Q.C.* and *Warren*. If the trusts of an office are annexed to a gift the inference is that there is a trust for those purposes, but that inference fails here, where the trusts annexed are not charitable, and that principle cannot apply.

VAISEY J., having stated the facts, continued:—The question is to whom, in the events which have happened, does the purchase money from the Westoning Estate, or the investments representing it, belong? I have to determine whether, upon the true construction of the will and in the events which have happened, and subject to the successive life estates of the testator's sisters, the trusts contained in clauses 14 and 15 (that is the gift of the land and the furniture) have failed; or whether the estate and furniture and contents are held on charitable trusts; and if, and so far as necessary, to direct a scheme.

The permutations and combinations of the cases relating to charitable trusts, or borderline charitable trusts, which the court has to consider seem to be unending; and I suppose there never will be a time, unless the law is in some way drastically altered, in which this problem will not constantly recur in novel and unprecedented forms.

One looks at the earlier decisions hoping for guidance, and sometimes finding with guidance a certain amount of perplexity;

¹ [1948] Ch. 241.

³ [1948] Ch. 241.

² Ibid. 250.

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but a large number of the cases which arise are, as experience shows, not precisely covered by any previous decision and many of them are cases to which the settled principles, however plain they may be as principles, are not very easy to apply with accuracy and confidence.

Jenkins J. gave a useful summary of the decisions up to that date in *In re Flinn*.³ In that case the gift was to "His Eminence the Archbishop of Westminster Cathedral London for the time being" of the testatrix's residuary estate, "to be used by him for such purposes as he shall in his absolute discretion think fit." Jenkins J. held,⁴ first of all, that was a gift to the Roman Catholic archbishop by virtue of his office and not as a personal gift, and that the words "to be used by him for such purposes as he shall in his absolute discretion think fit" did not give him an absolute discretion to use the residuary estate for every kind of purpose, however general the words might appear, or even to use that estate for general charitable purposes, but rather to use it for those charitable purposes which were within his ambit and under his direction as archbishop; in other words, this was a case in which the direction as to the purposes was merely an expression of explanation or enlargement to show and emphasize that the gift was not a personal gift but that it was a gift for what I may call archiepiscopal purposes.

This is a curious case, and for more reasons than one. Subject to the life estates of the testator's two sisters, and the High Commissioner having disclaimed the gift, the property is placed under the control, in the first instance, of two persons, the testator's sister, and a corporate person, the National Trust, with a further direction that if there were no unanimity of decision between those two people, then, in the natural course of events, the decision would rest with the National Trust, since the time when this decision would be operative is at and not before the death of the sister, who was given the first of the two life interests.

I am bound to say that, applying the principle explained rather than laid down by Jenkins J. in *In re Flinn*,⁵ it seems to me that I must look at this case as if the person who has the effective disposing power was the National Trust.

The National Trust is admittedly a charity with certain defined charitable purposes. That is best to be seen from *In re Verrall*,⁶ where it was held, among other things, that the purposes for which the National Trust had been incorporated were charitable

³ [1948] Ch. 241.⁴ *Ibid.* 249, 251.⁵ [1948] Ch. 241.⁶ [1916] 1 Ch. 100.

purposes, and they are expressed by Astbury J.⁷ as being "plainly public purposes, expressly stated to be for the benefit "of the nation. . . ." He went on to say that they had no choice of applying them to any other purposes.

It is said that the words which I have read, "preferably for "some purpose in connexion with Australia," must necessarily exclude any idea of the purposes to which the National Trust was confined, and in declaring these alternative purposes, which have to be brought into operation in the events which have happened, those words preclude the National Trust from applying the purchase money to the general purposes for which the National Trust was incorporated.

I cannot accept that. To begin with, the words introduced by the word "preferably" cannot be more than a mere predilection, and I must regard the National Trust as having, not by way only of property, but also by way of power, the right to dispose of this property, which is now represented by the proceeds of sale.

It seems to me on the whole, though I agree that it goes a little further than *In re Garrard*⁸ and *In re Norman*⁹ (both of which are mentioned in *In re Flinn*¹⁰) that this decision follows as a necessary sequel to those decisions. It is not so simple or straightforward or so clear-cut, but I think that the National Trust, by virtue not only of this property, but by virtue of the power which it also has, is given only such control over this property as enables it to dedicate it to purposes which are either the same or in *pari materia* with its own proper purposes as an incorporated charity.

I do not think that it is consistent with either of the two cases which I have mentioned to hold that the testator intended to give the National Trust a free hand so that it could, as is said in some of the cases, put the money in its pocket. I cannot construe the words as enabling the National Trust to devote the property to any charitable use irrespective of its own particular charitable purposes. I do not think, for instance, that the Trust could devote this to founding a scholarship at the university, or anything of that kind; or, indeed, that it could depart from its own statutory purposes.

I have come to the conclusion, not without some hesitation, that, relying largely on the summary of the law which was put

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⁷ [1916] 1 Ch. 100, 115.

⁸ [1907] 1 Ch. 382.

⁹ [1947] Ch. 349.

¹⁰ [1948] Ch. 241.

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to me in argument by Mr. Buckley, on behalf of the Attorney-General, I am obliged in this case to declare that the trusts concerning the estate and the furniture and effects disposed of by clauses 14 and 15 of the testator's will are good charitable trusts, and, if I am right in that, then it follows that I must direct a scheme to be brought in for the application of the money.

The court then heard argument on the second question, namely, the scope of the revocation contained in the codicil.

Pennycuick Q.C. and *E. Blanshard Stamp* for the first defendant, a nephew of the testatrix. The effect of the codicil was to strike out the interest of Marie Brignoli and also that of her children. It is well established that a codicil revoking a gift in a will is not to be construed as disturbing the provisions of the will further than is necessary, and that a strong indication is required to extend the revocation of a gift to a person so as to include the person's children. It depends on the construction of the particular will.

There are distinct indications in the codicil that the gift to the children of Marie Brignoli, as well as the gift to Marie Brignoli herself, was revoked by the codicil. The word "provision" is an apt word to denote not only a gift to Marie Brignoli herself but also provision for her family, although that word is not sufficient of itself. The most important indications are the words "in lieu of," followed by a gift of money settled on trusts for Marie Brignoli and her issue. "In lieu of" is sufficient to indicate that the substituted gifts are for the whole of the previous gifts in the will, otherwise the issue of Marie Brignoli would get an additional gift in remainder by the substituted gift. Another indication is that the will is to be read as if her name did not appear.

Under clause 13 of the will the contents of the house in Montpelier Place were given to Marie Brignoli absolutely. Therefore if the codicil does not revoke the interest of the children they would get the house without the furniture.

On the authorities this codicil should be construed as a whole-sale revocation. In *Tabor v. Prentice*¹¹ the words "to or in favour" had the effect of revoking all interests; and in *In re*

¹¹ (1884) 32 W.R. 872.

*Freme's Contract*¹² substitutional gifts in a codicil were held to effect wholesale revocations: see also *In re Whitehorne*.¹³

The testator had no idea of benefiting any particular children of Marie Brignoli because at the time of the will and codicil she was still unmarried. The authorities are summarized in Jarman on Wills, 8th ed., vol. 1, pp. 197–198, but it is a question of construction of the particular will, and the true construction of this codicil is that it effects a wholesale revocation.

J. Bradburn and *D. S. Chetwood* for other defendants interested under the will, and *Denys Buckley* for the Attorney-General, adopted the argument of *Pennycuick Q.C.* and *Blanshard Stamp*.

Pascoe Hayward Q.C. and *Nigel Warren* for Marie Brignoli and her two younger sons. It is conceded that the codicil is effective to revoke the interests of Marie Brignoli, but not the trusts in remainder, her interest is accelerated to her children.

Although it is possible to have an implied revocation, it must be a necessary one; and where a codicil is ambiguous, so that it might or might not be intended as a revocation of a gift in a will, then the gift should stand: see *In re Wray*.¹⁴ This codicil is within the words used by Jenkins L.J. in that case.¹⁵ If words in a clause of revocation can be given a more limited meaning, the court should do so, and should not read words as having any further revoking effect than is necessary: see also *In re Freeman*.¹⁶ It is significant that when revoking the gift the testator did not say Marie Brignoli and her issue; there is a distinct contrast between the words of revocation in the codicil and those used in the substitutional gift. If there be any doubt, the children should be given the benefit of it: see *In re Wray*.¹⁷

If it be held that this construction of the codicil be wrong, it is submitted that the power of appointment was not a provision for Marie Brignoli within the meaning of the codicil, and that the power of appointment is not therefore revoked. In *In re Brough*¹⁸ it was held that the revocation in a codicil had the effect of revoking a special power of appointment. It is sought to distinguish that case here, although it would be submitted in the Court of Appeal that *In re Brough*¹⁸ was wrongly decided.

J. A. R. Finlay for the eldest son of Marie Brignoli. The court should adopt a middle course. The proper construction of the

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¹² [1895] 2 Ch. 778.¹³ [1906] 2 Ch. 121.¹⁴ [1951] Ch. 425.¹⁵ *Ibid.* 434.¹⁶ [1910] 1 Ch. 681, 691.¹⁷ [1951] Ch. 425, 434.¹⁸ (1888) 38 Ch.D. 456.

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codicil is that the interest of the issue is not revoked, but that the power of appointment is revoked. The direction in the codicil that the will is to be read as if the name of Marie Brignoli did not appear means that she is to be removed as a participator in the will, but that her name must be left in where needed to describe other people. Removal of a name from a will altogether may make nonsense of the will and leave gaps in it. The words " Marie Brignoli and her issue " merely identify the fund; and where her name is required for descriptive purposes it must be left in. It is admitted that her beneficial interest is revoked, but on the authority of *In re Whitehorne*¹⁹ it is submitted that the trusts in favour of the children are not revoked. The special power of appointment should be held revoked; it was clearly a provision for Marie Brignoli, and as such it is directly within the words of revocation: see *In re Brough*.²⁰

VAISEY J., after stating the relevant clauses in the will and codicil, said:—It is clear that so far as Marie Brignoli's personal beneficial interests under the will are concerned they are revoked by the codicil. They include not only the life estate in the premises in Knightsbridge, but also the life estate in the testator's residue which he has given by reference to the gift of the Knightsbridge premises, and also a certain absolute gift of furniture; but the difficulty is whether that revocation revokes not only the beneficial gift to Marie Brignoli, but also the benefits conferred upon her children.

It has been pointed out that there are a number of indications in the will which seem to indicate that the revocation was to be a wholesale revocation; that is to say, of the benefits given to Marie Brignoli and her issue. In the first place, it was pointed out that the word " provisions " is of the widest possible character and might well include not only a direct beneficial gift to Marie Brignoli but provision for her and her family, and a good deal of weight should be given to that. There is the direction that the will is to be read as if her name did not occur in the document. When the testator proceeded to make an alternative gift in lieu of the revoked gift, he conferred a benefit not only on her but on her issue. There is the further point that the gift of furniture to Marie Brignoli must have been intended as a provision for her family rather than a personal gift to herself, and the destruction of that gift by the revocation seems to indicate that the family

¹⁹ [1906] 2 Ch. 121.

²⁰ 38 Ch.D. 456.

were not to be provided for as was originally intended by the terms of the will. There is the further fact that the gifts to her children are not gifts to them by name, but are gifts merely by reference to her, a point which I thought might have had some validity, but one which I now doubt because I understand that at the date of the codicil she was unmarried, so that the testator could not have indicated her issue otherwise than in the referential manner in which he did.

Those indications are all in favour of a wholesale revocation, and I have been referred to certain authorities which point in the same direction; such, for instance, is *Tabor v. Prentice*.²¹ If I were left to construe this will without guidance and apart from authority, there is a great deal to be said for the construction of a wholesale revocation; but, on the other hand, there is undoubtedly a strong and rigid rule that a codicil ought not to be construed as revoking a will except in so far as it does so necessarily; necessarily, that is, either by its express terms or by inevitable inference. It is said that the testator, having in his reference to the substituted gift, referred to the fund to which the accretion was to be made as one which was held for the benefit of Marie Brignoli and her issue, it is remarkable that he omitted to revoke the provisions made for her and her issue at the beginning of the codicil. The testator may have meant to effect a wholesale revocation, and I am inclined to think—it is a matter of guesswork—that he probably did; but is the matter so clear, so certain and so inevitable that I can disregard the overriding rule and principle that a will stands unaltered except in so far as the codicil can be said to alter it in plain terms?

Nearly all the cases that come to the court for the construction of documents do, of course, involve uncertainties which the judge is asked to resolve; and my attention has been called to *In re Wray*.²²

The headnote of that case gives a résumé of the judgments: “ . . . the principle to be applied was that when an interest was “ clearly given by a will it was not to be held to be revoked in “ the absence of clear words of revocation. If there were a gift “ under a will and an ambiguous clause in the codicil which might “ or might not be intended as a revocation, then the gift in the “ will should stand.” The court then considered what weight should be attached to words which are here super-added to the

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²¹ 32 W.R. 872.²² [1951] Ch. 425.

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words of revocation, directing that the will is to be read as if the name of the primary beneficiary did not occur therein.

The trend which the cases have taken is rather surprising, but there are a number of cases, some unreported, in which the words directing a will to be read as if the name of some person had been omitted are words which ought not to be read literally; that is to say, they are to be read as merely confirmatory of the preceding words of revocation. Thus, if a legacy to a named person is revoked and there are added words to say that the will must be read as if his name did not occur in it, that does not, for instance, necessarily discharge him from the office of executor and trustee to which he has been appointed in another part of the will. Although it seems to me that very scant attention has been paid to these very strong words, "the will is to be read" (sometimes the words "in all respects," or "throughout," are added, but here no such words are inserted) "as if the name of the person in question did not occur in it."

Applying the rules laid down in *In re Wray*,²² and expressing, as I think that the Court of Appeal did in that case, a good deal of doubt whether this construction is going to effect the true wishes of the testator. I hold that in this case there was only a partial revocation of the will; that is to say, a revocation confined to the beneficial interests of the legatee Marie Brignoli, leaving the provisions in favour of her issue unaffected.

It is an awkward decision, because, in certain events, if, for instance, the first tenant for life had died leaving Marie Brignoli still unmarried, it would mean that at some future indefinite date her prospective future issue would come into the succession, and great difficulties would arise thereby. But that is not a consideration which should weigh with me very much, and, with considerable doubt whether I am effecting the testator's intentions, on the ground that he has not succeeded in expressing them, I have come to the conclusion that I must confine the operation of the revocation to Marie Brignoli herself, leaving untouched the interest of her issue.

That raises a very short but interesting point: How far does that revocation deprive Marie Brignoli of her power of appointment among her issue? Does she retain that power, the revocation not affecting it, so that the gift to the eldest son is in risk of being displaced by the exercise of the power?

Mr. Finlay, for the eldest son, submitted a view of the will which impressed me very much. He says that the name of

²² [1951] Ch. 425.

Marie Brignoli could not be struck out of the will altogether, or it would make nonsense of it; there would be gaps which would make the document unintelligible. He said that her beneficial interests had undoubtedly gone, but that her power of appointment was, in the words of the codicil, a provision for her. Mr. Finlay put it in this way: In so far as the intrusion of her name in the will was, so to speak, adjectival or descriptive, one was bound to leave it there; but, in so far as it was put in giving her rights or imposing duties upon her, then the direction that her name was to be struck out ought to come into operation.

The point is a doubtful one, and it is to some extent covered by the decision of Kay J. in *In re Brough*.²³ There the headnote is as follows: "A testator by his will gave to his sister H. a life interest in a share of his residuary estate, and a special power of appointment by will over the capital of the share. By a codicil he revoked all devises and bequests whatsoever 'in favour of' H.:—Held, that the power was revoked as well as the life interest." There the point arose in a neat form, and on words which are indistinguishable from the words here, "provisions made for" Marie Brignoli in this will, and "devises and bequests whatsoever . . . in favour of" the testator's sister in *In re Brough*.²³

Kay J. said²⁴: "Beyond all doubt the life estate given to Harriet Brough by the will was revoked by the fifth codicil. But the question is, What became of the power of appointment? Was it revoked or not? That depends upon whether it is to be considered as a devise or bequest 'in favour of' Harriet. Some people might consider that it was a burden rather than a benefit, but the question is what the testator intended. Did he intend this to be 'in favour of' Harriet or not? A person who gives to another the power of disposing of a considerable part of his residuary estate must, in my opinion, be supposed to intend to confer on that person a favour; and the meaning of the word 'favour' in this codicil is what the testator intended it to be. I cannot doubt that he considered that the power of appointment which he gave to Harriet was a devise or bequest in her favour, and when he revoked all devises and bequests whatsoever contained in his will or codicils in favour of Harriet, I cannot doubt that he meant to revoke the power of appointment. Accordingly as to this share the gift in default of appointment must take effect."

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²³ 38 Ch.D. 456.²⁴ *Ibid.* 457, 458.

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I take the view that when a parent has a power of appointment among his or her issue, it is a provision very much in his or her favour and can be properly said to have been made for his or her benefit; and by that means I can explain the direction with regard to the name not occurring in the will in this case.

It is a strange point, and Mr. Hayward said that in another court he would suggest that *In re Brough* ²⁵ was wrongly decided. If I follow it, I may be erring, too, but I think that, on the whole, I am convinced by the truth and good sense of *In re Brough* ²⁵; because a father or a mother with such a power of control over his or her children as is given by this special power of appointment is in a more favourable position and more to be benefited than if he or she had no such controlling power.

If it had not been for *In re Wray*, ²⁶ I should have been disposed to have decided this case the other way, but I am inevitably much impressed by the strong observation in that case. It is a warning that if people make deathbed or other codicils, interfering with the plain terms of a will, there is a strong presumption that that codicil will be strictly read, and without speculation as to what was probably meant, but with regard to the rule, which is one of great value and importance, that no codicil can interfere with a will more than its words necessarily import.

The result is that I declare that on the true construction of the will the provisions contained in the codicil revoke all the trusts contained in clause 12 of the will for the benefit of Marie Brignoli herself but do not affect the trusts contained in the will for the benefit of her issue, with this exception, that the power of appointment given to her over the fund in favour of her children attaining 21 has ceased to be exercisable; and, following *In re Brough*, ²⁷ I declare that the gift to the issue in default of appointment takes effect in due course.

Declarations accordingly.

Solicitors: *Radcliffes & Co.; Leman, Harrison & Flegg; The Treasury Solicitor.*

I. G. R. M.

²⁵ 38 Ch.D. 456.

²⁷ 38 Ch.D. 456.

²⁶ [1951] Ch. 425.

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[1952 J. No. 1324]

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 June 27;
 July 1, 2, 30.

Sale of land—Act of bankruptcy by purchaser before completion—Vendor not entitled to rescind—Trustee's rights.

Bankruptcy—Contract for sale of land—Act of bankruptcy by purchaser before completion—Trustee's rights under contract—Vendor not entitled to rescind.

A vendor of land (under a contract where time is not of the essence of the contract) who receives notice between the date of the contract and the day fixed for completion that the purchaser has committed an act of bankruptcy, is not entitled to treat that notice as a repudiation of the contract entitling him forthwith to rescind and treat the contract as at an end, and thus defeat the rights under the contract of the purchaser's trustee in bankruptcy, if adjudication in bankruptcy should follow.

Powell v. Marshall, Parkes & Co. [1899] 1 Q.B. 710 distinguished.

ACTION.

By a written contract dated August 29, 1951, the defendant agreed to sell certain property to a purchaser for £3,750. The purchaser paid £375 as deposit to the defendant's solicitors. On exchange of contracts the purchaser was let into possession, pursuant to the special conditions of sale, for the purpose of executing certain work on the property. The conditions also provided that if the purchaser should fail to complete the purchase, any work done should enure for the benefit of the defendant without any payment therefor.

Completion was fixed for November 30, 1951, and the National Conditions of Sale (5th ed., 1948) were incorporated in the contract. The contract also provided that the deposit should be forfeited if the purchaser failed to complete the purchase.

By a letter dated November 21, 1951, the purchaser's creditors were notified that he was unable to meet his liabilities, and that a meeting of his creditors was convened for November 29, 1951. By that time the contract was ripe for completion, all the documents having been engrossed. At the meeting on that date the bankrupt gave notice that he intended to suspend payment. He was adjudicated bankrupt on his own petition on December 5, 1951. On December 21, 1951, the plaintiff was appointed trustee of the bankrupt's property, his appointment being certified by the Board of Trade on January 3, 1952.

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On December 3, 1951, the defendant's solicitors wrote the following letter to the purchaser, in which they purported to repudiate the contract and to forfeit the deposit: "We now write "on behalf of our client Mr. King [the defendant] to inform you "that he repudiates the contract for sale and purchase of free- "hold property as above dated August 29, 1951, on the ground "that on November 30 last, the date fixed for completion, you "were incapable of making a valid payment of the purchase "money in view of the act of bankruptcy and that by reason of "the announcement made at the meeting of your creditors on "November 29 that you would file your petition in bankruptcy "it is evident that you will not be capable within any reason- "able time, if at all, of completing the contract. We further "give you notice that Mr. King forfeits the deposit of £375 "received by us from you on August 8 last as agents for Mr. "King and in accordance with Condition 16B of the contract "the benefit of the work done by you on the premises will enure "to Mr. King without any payment or allowance by Mr. King "in respect thereof. We have advised Mr. King to re-enter the "property forthwith to finish the alterations to the buildings with "a view to resale of the property."

Early in 1952 the defendant resold the property for £4,900. The purchaser had given up possession before the resale.

The plaintiff claimed that his title as trustee related back to the first act of bankruptcy on November 21, 1951, and that the rights of the purchaser under the contract were vested in him as trustee; alternatively, the plaintiff claimed that he had adopted the contract to the knowledge of the defendant; and that the defendant's claim that the contract had been rescinded was wrongful.

The defendant alleged that the letter of November 21, 1951, was an act of bankruptcy which amounted to notice that the purchaser was unable to complete on November 30, 1951 (the day fixed for completion), or within a reasonable time of that date, and that he was, therefore, entitled to rescind the contract. He counterclaimed for a declaration that the contract was validly repudiated by his letter of December 3, 1951, and was no longer binding on him; that the deposit was forfeited, and that he was entitled to retain without payment the benefit of any work done to the property.

Muir Hunter for the plaintiff, the trustee in bankruptcy. On the proper construction of the Bankruptcy Act, 1914, the contract

is still subsisting, notwithstanding anything done by the bankrupt: see section 45 of the Act. HARMAN J.

The contract is a chose in action which vests in the trustee in bankruptcy, and by virtue of the doctrine of relation back his title under the contract relates back to November 21: see section 37 (1). Alternatively, the trustee has, to the defendant's knowledge, adopted the contract. He has a prima facie title under the Bankruptcy Act. [He referred to sections 37, 38, 45, 46, 47, 48, 54, 55 and 167.]

The contracts of a bankrupt are not terminated by an act of bankruptcy nor by adjudication: see *Brooke v. Hewitt*,¹ *Lawrence v. Knowles*,² and *Ex parte Chalmers*.³ In the last case it was said that it would not be right to take away the benefit of a bankrupt's contract from his creditors. The trustee has a right to elect whether he will perform the contract, and he must decide whether the value of the contract to the creditors as a whole justifies his accepting it. It is incumbent on a trustee to act promptly, which the trustee did in the present case: see *Morgan v. Bain*.⁴

Even if the rights of the purchaser were affected by his act of bankruptcy the rights of his trustee were not so affected: see *Ex parte Stapleton*.⁵

Where a contract provides for the sale of goods by instalments on credit the bankruptcy of the purchaser entitles the vendor to refuse to supply further instalments on credit, but apart from that the contract continues to subsist: see *Ex parte Chalmers*.⁶

An act of bankruptcy of a purchaser may deprive him of his right to claim specific performance because, so long as the act of bankruptcy remains, he cannot prove that he is ready and willing to perform the contract, but his trustee is not disentitled from doing so; he is a person with whom a vendor can safely deal. [He also referred to *Tolhurst v. Associated Portland Cement Manufacturers* (1900) *Ld.*⁷ and *Smith v. Hamilton*.⁸]

Maurice Berkeley for the defendant vendor. Once an act of bankruptcy has been committed the defendant would have to wait three months before he could complete, as during that time the purchaser cannot safely pay the purchase money. It is conceded that the benefit of any contract would vest in the

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HARMAN J. trustee, but the trustee cannot get a better title than the purchaser had to offer: see *Ex parte Newitt*.⁹

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It is stated in Williams on Vendor and Purchaser (4th ed., Vol. 1, p. 584) that where, on the sale of land, an act of bankruptcy is committed by the purchaser before completion, the vendor is entitled, while the act of bankruptcy remains available, to repudiate the contract, because the purchaser will not within a reasonable time be able to pay the purchase money. There are similar statements in Halsbury (2nd ed., Vol. 29, p. 358, para. 482; p. 366, para. 484); Dart on Vendor and Purchaser (8th ed., Vol. 1, p. 272), and Sugden on Vendor and Purchaser (14th ed., p. 396).

It is for this reason that a purchaser who has committed an act of bankruptcy cannot bring an action for specific performance: see *Franklin v. Brownlow*,¹⁰ *Lowes v. Lush*,¹¹ and *Dyster v. Randall & Sons*.¹²

The defendant, by November 23, knew of the act of bankruptcy; the contract was not completed on November 30 (the day fixed for completion), and he knew that the purchaser could not complete within a reasonable time of the day fixed; he was therefore entitled to repudiate the contract and to forfeit the deposit: see *Collins v. Stimson*¹³ and *Ex parte Barrell. In re Parnell*.¹⁴

If the trustee had intervened and the adjudication had been complete before the contract had been repudiated, the vendor could not have repudiated against the trustee, but the repudiation took effect before the adjudication.

*Powell v. Marshall, Parkes & Co.*¹⁵ is the converse case to this; there the vendor committed an act of bankruptcy. Time was of the essence of the contract in that case; otherwise it is similar to the present case. But it does not matter that time was not of the essence of the contract here, because the purchaser was unlikely to complete within a reasonable time: see *Collins v. Stimson*.¹⁶ Where time is of the essence of the contract it must be completed on the day fixed for completion, and where time is not of the essence the contract must be completed within a reasonable time of the day fixed; the purchaser's inability to do so entitled the defendant to repudiate.

⁹ (1881) 16 Ch.D. 522.¹⁰ (1808) 14 Ves. 550.¹¹ (1808) 14 Ves. 547.¹² [1926] Ch. 932, 941.¹³ (1883) 11 Q.B.D. 142.¹⁴ (1875) L.R. 10 Ch. 512.¹⁵ [1899] 1 Q.B. 710.¹⁶ 11 Q.B.D. 142.

The position must be looked at as at the date of repudiation, December 3; then the vendor could not safely complete because there might be an adjudication in bankruptcy. The doctrine of relation back does not help the trustee, because although he succeeds to the property of the purchaser he can have no more to offer than the purchaser: see *Ex parte Newitt*.¹⁷

*Brooke v. Hewitt*¹⁸ merely decides that specific performance is too complicated to be decided on demurrer; all that was decided in that case was that an act of bankruptcy does not dissolve a contract; that is not denied. In *Smith v. Hamilton*¹⁹ the purchaser did not say that she could not complete within a reasonable time, but here the purchaser could not have completed within a reasonable time. In *Lawrence v. Knowles*²⁰ it was held that the right of election must be exercised within a reasonable time: see also *Ex parte Chalmers*.²¹ The case of *Morgan v. Bain*²² related to the sale of goods, and was decided on the particular facts; there was no bankruptcy there, but it does not matter whether there was a bankruptcy or not, but whether there was an act of bankruptcy. In that case the contract was regarded as abandoned on the purchaser's insolvency.²³ *Ex parte Stapleton*²⁴ was also a case of sale of goods on credit; it merely decides that a trustee wishing to exercise his right of election must do so in a reasonable time. *Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd.*²⁵ only decided that liquidation of a company alone would not involve inability to carry out a contract.

The defendant was not bound to serve notice, as it would serve no useful purpose, the purpose of notice being to make time of the essence of the contract: see *Smith v. Hamilton*.²⁶

The defendant was not a trustee for other creditors, so that he should not claim in full the rights which he acquired from the purchaser, i.e., the deposit, the value of the work done to the property and the increased value of the property.

Hunter in reply. At the time of *Franklin v. Brownlow*²⁷ and *Lowes v. Lush*²⁸ the doctrine of relation back did not exist. But relation back is a necessary part of the law of bankruptcy in order that a bankrupt's creditors may not be unfairly treated. On

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¹⁷ 16 Ch.D. 522.

¹⁸ 3 Ves. 253.

¹⁹ [1951] Ch. 174.

²⁰ 5 Bing.N.C. 399.

²¹ L.R. 8 Ch. 289.

²² L.R. 10 C.P. 15.

²³ Ibid. 25.

²⁴ 10 Ch.D. 586.

²⁵ [1902] 2 K.B. 660.

²⁶ [1951] Ch. 174, 182, 183.

²⁷ 14 Ves. 550.

²⁸ 14 Ves. 547.

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the commission of an act of bankruptcy the property of the bankrupt becomes bound by contingent trusts. It was said that in contracts for the sale of land there was an implied term that on an act of bankruptcy the contract is repudiated. That would mean that a contract contained a forfeiture clause, but even if this could be said the trustee would be entitled to relief against forfeiture. The fact that the purchaser has committed an act of bankruptcy cannot enhance the merits of the defendant so as to entitle him to all that is now claimed by him.

The correct view is that the contract does not come to an end until the trustee has elected or disclaimed or the period has run out. It is conceded that this may involve hardship to a vendor, but no greater than that of other creditors, and an unpaid vendor of land is not in a better position than the other creditors. If a vendor were entitled to repudiate as alleged, he could take away a bankrupt's only asset in breach of the doctrine of relation back.

If no adjudication has taken place by the time of completion a vendor has the remedy of presenting a creditor's petition.

Cur. adv. vult.

July 30. HARMAN J., reading his judgment, said:—There appears to be no authority directly in point on the question at issue here, which can be stated shortly as being whether a party to a contract for the sale of land who receives notice of an act of bankruptcy by the other party pending completion of the contract can immediately put an end to it by accepting the repudiation implicit in the act of bankruptcy so as to deprive not only the person who commits the act of his rights, but to prevent the trustee in bankruptcy, if adjudication follows, from adopting the contract or disclaiming it under section 54 of the Bankruptcy Act, 1914.

The argument of the defendant runs as follows: Notice of an act of bankruptcy to the vendor means that he cannot safely perform the contract for a space of three months. In any case in which completion is by the contract fixed within that period he is not bound to wait so long, and in those circumstances the notice is in effect a repudiation of the contract. This of itself, being unilateral, does not put an end to the contract, but it gives the vendor the right by accepting the repudiation to rescind and treat the contract as at an end, and if he does so before adjudication there is an end of the matter. It is admitted that if

adjudication follows before the vendor has accepted the repudiation he must deal with the trustee in bankruptcy, as he has the right to do under section 54 (4) of the Bankruptcy Act, 1914, by calling on him either to disclaim or to adopt the contract within 28 days; alternatively, he may apply to the court under section 54 (5) of the Act.

If this argument be right it seems to me that the contract must be at an end directly the vendor accepts the repudiation constituted by notice of the act of bankruptcy and that he need not wait for the date fixed by the contract for completion, and this was the contention put forward in the letters which I have read. It was, however, one of the defendant's arguments that he could at any rate by waiting till the completion date put an end to the contract by accepting the purchaser's repudiation of it.

The defendant's proposition rests upon a statement in Williams on Vendor and Purchaser, 4th ed., vol. 1, at p. 584, where is the following passage against the sidenote "Act of bankruptcy by the purchaser": "If the vendor has notice of an act of bankruptcy committed by the purchaser, he cannot safely proceed with the contract so long as the act of bankruptcy remains available; for any money subsequently paid to him by the purchaser might be recovered back by the trustee under a consequent adjudication of bankruptcy against the purchaser. For this reason, a purchaser who has committed an act of bankruptcy which remains available against him cannot enforce the specific performance of the contract by the vendor. And it appears that, if time is of the essence of the contract, and on the day fixed for completion the purchaser's act of bankruptcy still remains available against him, the vendor will be entitled to treat the contract as broken and to claim the deposit as forfeited. And if time is not of the essence of the contract, it seems that the vendor receiving notice of an act of bankruptcy by the purchaser may at once take the objection that the purchaser is not and will not at the time fixed for completion be capable of making a valid payment of the purchase money, and may repudiate the contract on this ground."

*Collins v. Stimson*²⁹ is cited as authority for the author's last proposition, but in my judgment it is no authority for it. That case merely decides that a trustee in bankruptcy cannot recover from a stakeholder the deposit paid by the bankrupt on

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HARMAN J. a contract for a purchase which the trustee made no claim to complete. This appears from the headnote, which is in these terms: "A bankrupt, having disposed of his goods in fraud of his creditors, opened an account in a bank with the proceeds, and having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque drawn upon the bank. The vendor and the defendant acted bona fide and without notice of the bankruptcy or of the fraudulent conduct of the bankrupt:—*Held*, that the bankrupt's trustee was not entitled to recover the deposit from the defendant so as to prevent it from being forfeited to the vendor upon the non-completion of the contract." To the same effect is *Ex parte Barrell. In re Parnell*.³⁰

The case which comes nearest to the proposition is *Powell v. Marshall, Parkes & Co.*³¹ The contract there was for the sale of a public house. The day fixed for completion was December 15, 1897. The vendor committed an act of bankruptcy on December 2 and on December 9 the purchaser refused to complete and demanded the return of his deposit. The writ was issued by the purchaser against the vendor and a stakeholder to obtain repayment of this sum, and he succeeded on the ground that at the date fixed for completion the vendor was not in a position to complete. It was admitted that time was of the essence of the contract, and it followed that failure to complete on the due date was repudiation which entitled the purchaser to rescind forthwith. A. L. Smith L.J. said this³²: "By the terms of the contract the purchase was to be completed on a certain day, and if the plaintiff, as vendee, neglected or refused to complete, the deposit was to be forfeited. It is admitted that time was of the essence of the contract. Before the day fixed for completion a bankruptcy notice was served on the vendor, and as he did not comply with it an act of bankruptcy was committed by him. The plaintiff heard of this, and he gave notice that he should not go on with the transaction, and demanded back the deposit. The question whether he can recover it turns on this: Was the vendor in a position to complete on the day fixed for completion? I agree with the learned judge who tried the case that the vendor was not in a position to complete. If the vendor had conveyed the property, and afterwards had been adjudicated bankrupt on the act of

³⁰ L.R. 10 Ch. 512.³² *Ibid.* 712.³¹ [1899] 1 Q.B. 710.

“bankruptcy which he had committed, his trustee could have
 “intervened on the ground that his title related back to the date
 “of the act of bankruptcy. If the purchase-money had been
 “paid to the vendor, the trustee could have claimed it again
 “from the plaintiff, on the ground that the payment to the
 “vendor was made after notice of an act of bankruptcy by him.
 “Under these circumstances, it seems to me to be clear that
 “the vendor was not in a position to complete on the day fixed
 “for completion.”

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In the article on Sale of Land in Halsbury (2nd ed., vol. 29) is the following (para. 482, p. 358): “Accordingly, a vendor who
 “has committed an act of bankruptcy is not in a position to
 “obtain specific performance of the contract for sale until the
 “three months have elapsed; and a purchaser who receives
 “notice of an act of bankruptcy by the vendor which prevents
 “the vendor being in a position to complete on the date fixed
 “for completion can, if time is of the essence of the contract,
 “immediately claim to treat the contract as broken and recover
 “any deposit he has paid.”

This statement is justified by *Powell v. Marshall, Parkes & Co.*,³³ but it seems to me that the fact that time was of the essence of the contract is a crucial difference between that case and the present one.

Another statement in the same volume of Halsbury (para. 484, p. 359) begs the question, as it does not state what is the proper time for completion. In *Dart on Vendor and Purchaser* (8th ed., vol. 1, p. 272) the view taken in Halsbury is in effect confirmed; and *Sugden on Vendor and Purchaser* (14th ed., at p. 396) touches the point but throws no additional light upon it.

The plaintiff's case rested on the submission that an unpaid vendor of land should be no better off than other creditors of a man who becomes bankrupt before completion of a contract. It was argued that by virtue of the doctrine of relation back this bankruptcy began on November 21 while the contract was still in force and not due for completion, that this was a chose in action vesting in the trustee under section 37 (1) of the Bankruptcy Act from that date, and that the defendant, being in the position of a creditor, cannot by his own act after that date withdraw from the trustee property which would be an asset in the bankruptcy. It was pointed out that if the defendant here is right he may retain, first the deposit,

³³ [1899] 1 Q.B. 710.

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secondly the value of the work done by the bankrupt on the property, and thirdly the enhanced price obtained for the property, all of which would be assets in the bankruptcy, and that in effect the defendant would have been preferred to this extent to other creditors. Moreover, it was argued that if the defendant's claim be right a bankrupt may be stripped between the act of bankruptcy and adjudication of all his profitable contracts, leaving the trustee only the burden of those which are unprofitable and that this is contrary to the principle of the bankruptcy law, which is, to realize all the bankrupt's assets for the benefit of all his creditors.

It was agreed on both sides that neither the act of bankruptcy nor indeed the adjudication automatically put an end to the bankrupt's contracts, and for this there is indeed ample authority, going back as far as *Brooke v. Hewitt*.³⁴ In *Lawrence v. Knowles*³⁵ these words are in the sidenote: "Held, that the "bankruptcy and insolvency of O., and the insufficiency of his "assets, were circumstances from which the jury might properly "infer that he and his assignees had not been ready and willing ". . ." to perform the contract. The jury held on the evidence that the contract had been abandoned because the assigns (that is to say, in effect, the trustee in bankruptcy) had not taken any steps within a reasonable time to perform it, but it was assumed that had they elected to perform it within a reasonable time they would have had the right to do so. Thus, Tindal C.J. says³⁶: "Now, the contract was to be performed on July 1, 1835. In "February 1835 Okill became a bankrupt, and his assignees "were bound in a reasonable time after July 1, at the latest, to "declare whether they meant to take to the contract or not." He then goes on to say that there was an unreasonable delay in the matter, and ends up with these words: "There was enough "in these circumstances to justify the jury in finding that the "contract was abandoned. . . ."

Bosanquet J. says as follows³⁷: "Here, the bankrupt "entered into extensive engagements, which he was incapable "of fulfilling: his assignees might elect to adopt them, but their "election ought to be declared within a reasonable time; and "upon a contract which ought to have been completed in July, "1835, it is most unreasonable that assignees should hold their "right of election in suspense till January 1838." In that case,

³⁴ 3 Ves. 253.³⁵ 5 Bing.N.C. 399.³⁶ Ibid. 408.³⁷ Ibid. 409.

however, there had been nothing done by the party charged to accept the repudiation of the contract and it was merely the passage of time which justified the jury's verdict that it had been abandoned by both parties.

The plaintiff further admitted that the act of bankruptcy, so long as available, must deprive the purchaser of the right to specific performance on the ground that he could not allege or prove at the trial that he was always ready and willing to complete the contract. There is authority for this proposition in *Franklin v. Earl Brownlow*³⁸ and the immediately preceding case of *Lowes v. Lush*.³⁹ The plaintiff argued, however, that this disability on the part of the bankrupt did not disentitle his trustee to specific performance or at any rate to damages for breach of contract.

Even on the footing that the act of bankruptcy may be itself such a repudiation as entitles the vendor to put an end to the purchaser's rights, the plaintiff argued that it did not follow that this also put an end to the rights of the trustee. Support for this proposition seems to be afforded by *Ex parte Stapleton*,⁴⁰ where the headnote is as follows: "When the purchaser of goods 'sold on credit becomes bankrupt before the vendor has parted 'with the possession of the goods, the trustee in the bankruptcy 'has a right to elect to complete the contract by paying the 'agreed price in cash within a reasonable time. But, if he does 'not do so, the vendor is entitled to treat the contract as broken, 'and to resell the goods, without first tendering them to the 'trustee. And the vendor is entitled to prove in the bankruptcy 'for damages for the breach of contract, the measure of damages, 'if the market is falling, being the difference between the con- 'tract price and the price obtained on the resale.'" Jessel M.R. said this⁴¹: "I am of opinion that if a person who has entered 'into a contract of this kind gives to the vendor before he has 'parted with the goods that which amounts in effect to this 'notice, 'I have parted with all my property, and am unable to 'pay the price agreed upon,' it is equivalent to a repudiation 'of the contract. Of course that would not affect the right of 'the trustee in the liquidation to elect to fulfil the contract on 'paying the price in cash, provided that he does so within a 'reasonable time. But, if he does not do that, I think that the 'vendor is entitled to treat the contract as broken, without 'making any tender of the goods to the trustee."

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*Ex parte Chalmers*⁴² again shows that bankruptcy of itself does not discharge the contract. It does, however, modify a contract for delivery of goods by instalments so as to justify the vendor in withholding further deliveries except upon being paid off any arrears and upon receiving cash on delivery. Subject to this modification the contract remains on foot; and this passage occurs towards the end of the judgment of Mellish L.J.⁴³: "What, then, is the position of the parties upon the bill becoming dishonoured and the vendee insolvent? According to Lord Abinger's view of the law in *Miles v. Gorton*,⁴⁴ the contract to deliver is thereby put an end to altogether. I am not inclined to go so far as to say that; but I think that, at all events, the vendor has a right, in such a state of things, to say to the vendee, 'I will not deliver the goods until I see that I shall get my price paid.' So, in the present case the plaintiff, or his assignees in bankruptcy, could not, I think, call upon the defendant to deliver the rest of the iron without paying him for it"; and later he said this⁴⁵: "I admit that the mere non-payment of the price of the November instalment did not of itself give a right to the vendor to refuse to perform the contract; and I agree with what was said by Crompton J. in *Griffiths v. Perry*,⁴⁶ that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be very unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts. But if an insolvent has any such beneficial contracts, it is his duty to inform his creditors or the Court of Bankruptcy, if the case be within its jurisdiction, of the fact, and he can then apply to have a sufficient part of his assets applied for the completion of the contracts, and if the contracts were beneficial this would, without doubt, be allowed by his creditors or by the Court. If this were done, and due notice were given to the vendor, I entertain no doubt that he would be bound to complete the contract on his part, and would not be allowed to take advantage of the insolvency of the other party to put an end to the contract. But where the insolvent or his trustee does nothing of the kind, he practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his

⁴² L.R. 8 Ch. 289.⁴³ Ibid. 292, 293.⁴⁴ (1834) 2 Cr. & M. 504.⁴⁵ L.R. 8 Ch. 293.⁴⁶ (1859) 1 E. & E. 680, 688.

“contracts.” That case, however, only shows that a trustee who wishes to adopt the bankrupt’s contracts must act promptly. HARMAN J.

In *Morgan v. Bain*,⁴⁷ which was again a case of sale of goods by instalments, it was held that the conduct of the plaintiffs justified the defendants in believing that they had abandoned the contract. It was pointed out by Lord Coleridge C.J. that rescission of a contract must be by both parties. He said⁴⁸: “The question that is raised for our consideration is, whether, on May 13, there had been a rescission of the contract. Rescission must be by both parties; either both must have intended to rescind, or one must have so acted as to justify the other in thinking that he intended to rescind. It is clear that the omission to perform certain acts incumbent upon a party to a contract may justify the other party in coming to the conclusion that, in point of fact, the party guilty of the omission intends to abandon the contract, and is himself treating it as abandoned, and rescinding it.” Then he quotes from *Ex parte Chalmers*⁴⁹ (which I have already cited) and said this⁵⁰: “To sum up, therefore, we have in this case the fact of insolvency, coupled with the fact that upon such insolvency the insolvents take none of the steps essential to indicate that they meant to stand by the contract.” This case again assumes that a trustee who acts promptly will be entitled to performance.

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The defendant argued that the trustee only succeeds to the rights of the bankrupt and can be in no better position than he. In support of this was cited a passage in *Ex parte Newitt*,⁵¹ where James L.J. said⁵²: “The broad general principle is that the trustee in a bankruptcy takes all the bankrupt’s property, but takes it subject to all the liabilities which affected it in the bankrupt’s hands. . . .” This, of course, I accept if it be read in conjunction with the law as to relation back. In the present case the relevant date for considering the bankrupt’s rights is November 21, when this contract was valid and subsisting for all purposes.

On the whole it seems to me that the argument of the plaintiff ought to prevail. It is no doubt unfortunate for the vendor that his purchaser should commit an act of bankruptcy pending completion, but he is not without remedy. If within a reasonable time no adjudication follows he may himself, when the completion day arrives, present a petition in bankruptcy and so get someone

⁴⁷ L.R. 10 C.P. 15.

⁴⁸ Ibid. 22.

⁴⁹ L.R. 8 Ch. 289

⁵⁰ L.R. 10 C.P. 23.

⁵¹ 16 Ch.D. 522.

⁵² Ibid. 531.

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with whom he can safely deal. In any event, he is no worse off than other creditors, and ought in my judgment to be no better off. I am unable to agree that a vendor ought to be allowed to treat an act of bankruptcy before the date of completion as an anticipatory breach entitling him immediately to repudiate, or to wait for the day fixed for completion and then treat the contract as though time were of its essence, failure to complete on that day entitling the vendor immediately to rescind.

I was reminded during the hearing of a decision of my own of *Smith v. Hamilton*.⁵³ The present contract was made subject to the same general conditions as were applicable in that case. The defendant suggested that the act of bankruptcy by the purchaser entitled the vendor to act at once in reliance on No. 25 of the National Conditions of Sale. In my judgment that is not the case; nor I think was the act such improper conduct, as those words are used by Fry J. in *Green v. Sevin*,⁵⁴ as to justify the vendor in serving what I ventured in *Smith v. Hamilton*⁵⁵ to call an ultimatum, by, for instance, a notice of 14 days' duration. The legislature has made acts of bankruptcy available to creditors for three months and it appears to me that the vendor must either await that period to see whether he can safely complete or he must present a petition in bankruptcy if no other creditor takes that step in the interim.

Accordingly I hold that the defendant was not justified in repudiating the contract as he did and that the plaintiff is entitled to damages for breach of contract, to be ascertained by inquiry if not agreed beforehand.

Judgment for plaintiff.

Solicitors: *J. M. Menassé & Co.; Ward, Bowie & Co.*

I. G. R. M.

⁵³ [1951] Ch. 174.

⁵⁵ [1951] Ch. 174.

⁵⁴ (1879) 13 Ch.D. 589, 599.

In re WHARFEDALE BREWERY CO. LD.WYNN-
PARRY J.

[00320 of 1952.]

1952
July 23.

Company—Winding up—Surplus assets—Arrears of preferential dividend—Assets now distributable between preference and ordinary shareholders.

A company, incorporated in 1896, passed resolutions in 1896 and 1897 sanctioning the issue of preference shares with the right to a fixed cumulative dividend and providing that those shares should rank "both as regards dividend and capital in priority to the other shares but shall not confer any further right to participate in profits or surplus assets."

In 1952 the company went into voluntary liquidation and there were, at the date of the commencement of the winding up, profits amounting to approximately £1,700. The dividends on the preference shares were in arrear to the extent of over £112,000. There were, in due course, surplus assets in the hands of the liquidator amounting to £62,887:—

Held, that, on the true construction of the resolutions, the whole of the fund which constituted the surplus assets was distributable among the holders of the preference shares.

In re W. J. Hall & Co. Ltd. [1909] 1 Ch. 521 not followed.

Dicta of Neville J. in *In re New Chinese Antimony Co. Ltd.* [1916] 2 Ch. 115, 118, and P. O. Lawrence J. in *In re Springbok Agricultural Estates Ltd.* [1920] 1 Ch. 563, 565 followed.

ADJOURNED SUMMONS.

A company was incorporated in 1896, and its original capital was £30,000, divided into 3,000 shares of £10 each. Subsequently the capital was increased to £80,000, divided into 4,000 preference shares of £10 each and 4,000 ordinary shares of £10 each, as follows:

(a) By a special resolution, passed and confirmed in 1896, it was resolved: "That the capital of the company be increased to £50,000 by the creation of 2,000 new shares of £10 each, to be called preference shares, and to confer on the holders thereof the right to a fixed cumulative preferential dividend at the rate of 6 per cent. per annum on the capital paid up thereon respectively, and such preference shares shall rank both as regards dividend and capital in priority to the other shares but shall not confer any further right to participate in profits or surplus assets."

(b) By a special resolution, passed and confirmed in 1897, it was resolved: That the capital be increased from £50,000 to

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£80,000 by the creation of (1) 1,000 new ordinary shares of £10 each to rank *pari passu* with the original ordinary shares, and (2) 2,000 new preference shares of £10 each. "and that such preference shares shall confer on the holders thereof the right "to a fixed cumulative preferential dividend at the rate of £6 "per cent. per annum on the capital paid up thereon respectively, "and shall rank, both as regards dividend and capital, in priority "to the ordinary shares in the capital for the time being of the "company, and *pari passu* in all respects with the 2,000 preference shares of £10 each created in 1896, but shall not confer "any further right to participate in profits or surplus assets."

On January 24, 1952, the company went into voluntary liquidation. At the date of the resolution for the winding up of the company the arrears of dividends on the preference shares amounted to over £112,000. At the date of the winding up there were profits available for distribution by way of dividend amounting to approximately £1,700. In April, 1952, the liquidator had a surplus of £62,887, available for distribution, and he took out a summons to determine whether the preference shareholders were (a) entitled, in priority to any repayment of capital to the holders of the ordinary shares, to the full amount of the arrears of the 6 per cent. cumulative preferential dividend on the preference shares, or (b) were entitled in priority as aforesaid only to arrears equivalent to the undistributed profits of the company earned before the commencement of the winding up.

K. W. Mackinnon for the liquidator.

G. Brian Parker for a preference shareholder.

J. A. Plowman for an ordinary shareholder.

WYNN-PARRY J. This summons raises a short question of construction in the voluntary liquidation of the company, which went into liquidation in January this year. At the date of the resolution it had an issued capital divided into preference and ordinary shares of £10 in each case, of which 4,000 preference shares and 2,500 ordinary shares had been issued, and all were fully paid up. There were, at that date, arrears of the preference dividend amounting in the aggregate to over £112,000. At the date of the winding up there were available profits for distribution by way of dividend while the company was a going concern of approximately £1,700. In the liquidation the liquidator now has a surplus of £62,887, and the question is how that sum should be divided between the preference and ordinary shareholders. The

answer depends on the construction of the relevant provision in the resolutions creating the preference shares and certain authorities to which I must later refer.

The capital originally consisted of one class of shares, but it was subsequently increased, and it was by the resolution for the first increase that part of the preference shares were created. There was a subsequent resolution increasing the capital by the creation of further preference shares, but the same rights were attached to these preference shares as to those created by the earlier resolutions. The resolutions provided that the preference shareholders should have the right to a fixed cumulative preferential dividend of 6 per cent. per annum and should rank both as regards dividend and capital in priority to the other shares. It is agreed that, having regard to certain modern decisions, this provision should be read so that the preference shares should rank in a winding up both as regards dividend and capital in priority to the other shares. There is a conflict of authority on the point which I am called on to decide, namely, whether, under a provision in these terms, the preference shares are entitled to arrears of dividend, irrespective of whether or not profits were available to pay that dividend at the commencement of the liquidation.

The first case to which I have to refer is *In re W. J. Hall & Co. Ltd.*¹ In that case the articles of association provided that, in the event of the company being wound up, the surplus divisible assets for the time being remaining "after paying the liabilities of the company shall be applied first, in repaying the capital paid up on the said 500 preference shares or so many thereof as may be issued for the time being, and secondly, in paying the arrears (if any) of the 5 per cent. preferential dividends thereon to the commencement of the winding up" and that the balance should belong to the ordinary shareholders. The accumulated profits at the commencement of the liquidation were less than the arrears of the preference dividend at that date. Two points were decided by Swinfen Eady J. First, he held that the preference shareholders were not entitled to claim arrears of dividend beyond the amount of the accumulated profits. Secondly, he held that arrears of dividend were payable whether declared or not. At the end of his judgment his Lordship says this: "Reading the memorandum and articles together, I hold that the preference shareholders are entitled to the arrears on their

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¹ [1909] 1 Ch. 521.

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" 5 per cent. dividends, whether declared or not, but so far only
" as profits are now available."

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It is difficult, with all respect to the learned judge, to see by what process of reasoning he arrived at that decision, because he was dealing with an article which provided that, in the event of the company being wound up, the surplus divisible assets should be applied *inter alia* in paying the arrears of the 5 per cent. preferential dividend thereon. The surplus divisible assets represent no doubt a mixed fund, but a fund which for all purposes in a winding up must be treated as assets and not as partly assets and partly profits.

That decision was unfavourably commented on first by Neville J. in *In re New Chinese Antimony Co. Ltd.*² In that case the articles of association were substantially in a form similar to that in the earlier case. Neville J. in the course of his judgment said that the rights of the preference shares were determined by the special resolution under which they were issued. He read the relevant clause, and said: "The meaning of those words is to 'my mind perfectly clear. We have to deal with a fund which 'is not capital or income or profits, but surplus assets. That is 'what we have to distribute. There is nothing to make any 'distinction between capital and income. The only point is what 'is meant by 'arrears of the preferential dividend aforesaid.'"

Having discussed further the meaning of the clauses in question and having referred for support to one of the points made by Swinfen Eady J. in his judgment in *In re W. J. Hall & Co. Ltd.*,³ so far as concerned the suggested limitation of the dividends to declared dividends, Neville J. went on and said: "In that case "Swinfen Eady J. went on to decide that there could be no "arrears of dividends payable except so far as there had been "profits. With all deference, I fail to follow that part of the "decision, but it does not apply to this case. I am dealing with "the division of surplus assets, not with the declaration of a "dividend. I cannot see that it makes any difference whether "there are profits or not." That observation, it is true, was obiter, but it is as clear an indication as a judge could give that he disagreed with the reasoning of Swinfen Eady J. in the earlier case.

The case of *In re W. J. Hall & Co. Ltd.*³ was further criticized in the later case of *In re Springbok Agricultural Assets Ltd.*⁴ In

² [1916] 2 Ch. 115, 118.

⁴ [1920] 1 Ch. 563.

³ [1909] 1 Ch. 521.

this case P. O. Lawrence J. had to consider a provision in the articles of association of that company to the effect that in the event of the winding up of the company the holders of the preference shares should be entitled to have the surplus assets applied first in paying off the capital paid up on the preference shares and secondly, in paying off the arrears, if any, of the preferential dividend to the commencement of the winding up and thereafter to participate rateably with the holders of other shares in the residue, if any, of such surplus assets as should remain after paying off the capital paid up on such other shares.

He says in the course of his judgment⁵ that the resolution is in substance similar, though not in identically the same language, to the material resolution in *In re New Chinese Antimony Co. Ltd.*⁶ Later, he says: "It has been argued that the matter is "governed by the decision of Swinfen Eady J. in *In re W. J. Hall & Co. Ltd.*"⁷ That case was decided on the construction of "an article which, though similar to clause (d) of the fourth "resolution, was not in precisely the same words. I do not think "that I am bound by that decision as the words are different, "but in any case I do not agree with the reasons given by the "learned judge for his decision. He seems to have held that "the amount of the arrears of preference dividends was limited "to the amount of such dividends as could have been properly "declared but was not actually paid while the company was a "going concern. The learned judge decided that there could be "arrears of dividends although no dividends had been declared, "and in this I agree with him; but he then proceeded to hold "that it was essential that profits should have been earned out "of which a preferential dividend could have been declared and "paid before it could be said that the dividend was in arrear. "In my view that is not the true construction of the special "resolution in this case."

It is to be remembered when reading that sentence that the learned judge had already in two earlier passages made clear that in his view the provision which he had to consider in that case was in substance similar to the material articles of association in the case of *In re W. J. Hall & Co. Ltd.*⁸ Later, P. O. Lawrence J. made it clear that he agreed with and approved of the reasoning of Neville J. in the second case to which I have referred—*In re New Chinese Antimony Co. Ltd.*⁹

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⁵ [1920] 1 Ch. 563, 565.

⁶ [1916] 2 Ch. 115.

⁷ [1909] 1 Ch. 521.

⁸ [1909] 1 Ch. 521.

⁹ [1916] 2 Ch. 115.

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There is the conflict. In my judgment, I am in the same position as regards the case of *In re W. J. Hall & Co. Ltd.*¹⁰ as that in which both Neville J. and P. O. Lawrence J. respectively found themselves. That is, I am not bound by it. Indeed, it appears to me that I am in a position to say that the weight of authority, notwithstanding that the observations of both these learned judges were, in each case, obiter, is against the view of Swinfen Eady J.

Speaking with all respect to his judgment, I for myself cannot agree with his conclusion, and I find myself unable to follow the reasoning by which he arrived at that conclusion on the second point, and I therefore prefer to follow the two later decisions.

Turning back to the relevant resolution in this case, I am unable to discover any ground of distinction between the language used in this resolution which I have to consider and the material provisions in each of the three cases to which I have referred. As I have said, the effect of the modern authorities is that I must read this resolution as if after the words "and such preference "shares shall rank" there were inserted "in a winding up," the resolution continuing "both as regards dividend and capital in "priority to the other shares but shall not confer any further right "to participate in profits or surplus assets."

In my view, the word "profits" there refers back to the phrase "to confer on the holders thereof the right to a fixed "cumulative preferential dividend at the rate of 6 per cent. per "annum on the capital paid up thereon, respectively"—that is, it refers back to the right of the preference shareholders while the company is a going concern. Similarly, the phrase "surplus "assets" refers to the provision which follows, which I have already read, beginning "and such preference shares shall rank."

Thus in my judgment it is clear that on the true construction of these resolutions, when one comes to consider the position in a winding up, the fund, and the only fund, which is to be considered is the fund which constitutes the surplus assets, and it is that fund only the distribution of which falls to be considered.

On that reasoning, it appears to me that this case is completely within the dicta of Neville J. in *In re New Chinese Antimony Co. Ltd.*¹¹ and P. O. Lawrence J. in *In re Springbok Agricultural Assets Ltd.*,¹² and further, speaking for myself, even without these two authorities and faced only by the earlier decision in

¹⁰ [1909] 1 Ch. 521.

¹² [1920] 1 Ch. 563.

¹¹ [1916] 2 Ch. 115.

In re W. J. Hall & Co. Ltd.,¹³ I would have come to the conclusion that the whole of the divisible fund (£62,887), subject to the outstanding costs of the liquidation, is in the circumstances distributable among the holders of the preference shares.

Declaration accordingly.

Solicitors: *Gibson & Weldon, for Wooler & Co., Leeds; Wright & Bull, for Emsley & Son, Leeds.*

J. L. D.

¹³ [1909] 1 Ch. 521.

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In re BANQUE INDUSTRIELLE DE MOSCOU.

[1952 B. 944.]

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1952
July 28, 29.

Company—Winding up—Russian bank with London branch—Dissolution under Russian law—Winding-up order—Order expressed to be without prejudice to claim by Crown to assets as bona vacantia—Crown entitled only to surplus—Form of order.

On June 11, 1951, an order was made that a company, incorporated under the laws of the Empire of Russia and having a branch in London, which had been, by January 1, 1918, effectively dissolved under the laws of Russia, should be wound up under the provisions of the Companies Act, 1948. A liquidator was appointed and, as a result of an application for the protection of the Crown in regard to its claim against assets as bona vacantia, a final paragraph was incorporated in the order in the following form: "And this order is without prejudice to the claim of the Crown to any of the assets of the said company which may have become bona vacantia":—

Held, that the final paragraph clearly proceeded on the basis that the control over the assets was vested in the liquidator and that, if at the end of the proper administration there should be found a surplus, that surplus, and no more than that surplus, was saved to the Crown by the concluding paragraph of the order.

ADJOURNED SUMMONS.

A company, incorporated under the laws of the Empire of Russia, was, at the latest by January 1, 1918, effectively dissolved under the laws of Russia.

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On June 11, 1951, an order was made that the company "be wound up by this court under the provisions of the Companies Act, 1948," and the order provided that one of the official receivers attached "to this court be constituted provisional liquidator of the affairs of this company." It was further ordered "that the costs of the petitioners and of the solicitor for the affairs of His Majesty's Treasury of the said petition be taxed and paid out of the assets of the said company." Provision was made for the costs of the Treasury Solicitor, because he appeared by counsel to ask that there should be some protection for the Crown in regard to its claim against the assets as bona vacantia, and this led to the incorporation of the last paragraph of the order, which was in this form: "And this order is without prejudice to the claim of the Crown to any of the assets of the said company which may have become bona vacantia." A summons was taken out by the liquidator to determine whether the effect of that paragraph, as was contended on behalf of the Crown, was to preserve, without qualification, the claim of the Crown to all the assets of the company within the jurisdiction of the court, or, as was contended on behalf of the liquidator, whether the effect of that paragraph was of a more qualified nature.

G. T. Hesketh for the liquidator.

Charles Russell Q.C. and *R. Gwynn Rees* for the petitioning creditors in the winding up. The debts are payable in England and are governed by English law. The Crown is not entitled to assume that the winding-up order can be ignored. If so, a winding-up order in a case of this kind would become a solemn farce. The order is an effective order and there is nothing to make it ineffective. It is admitted that the Russian assets became bona vacantia, but the English law will only to a certain extent recognize the Russian decree.

In cases of this kind the Crown's right to bona vacantia is a qualified and defeasible right. That right is only to be temporarily defeated, and defeated only so far as it is necessary to give effect to the order and the administration which will follow consequent on the order. The whole purpose of the winding-up order is to enable creditors to be paid. If the contention of the Crown is right, that legislation is, in cases involving companies, wholly ineffective, and, if the Crown has an overriding power, is rendered nugatory. As to the powers of a liquidator in circumstances of this kind, see *Russian and English Bank and*

*Florance Montefiore Guedalla v. Baring Brothers & Co.*¹ The same reasoning applies to the present case.

It is the liquidator's duty to claim the assets of third parties and to distribute them. There is no doubt that the winding-up order, apart from this particular paragraph, would have the effect of defeating the Crown's claim. The liquidator can assert a claim to outstanding assets and it is his duty to deal with those assets.

The Crown is not entitled to contend that the court can only make the order effective with the consent of the Crown. The existence of the phrase that the order is "without prejudice to" the claim of the Crown to any of the assets of the said company "which may have become bona vacantia" has the effect of avoiding any doubt as to the rights of the Crown, if the liquidator has carried out his duties. [Counsel referred to *In re Tovarishestvo Manufactur Liudvig-Rabenek*.²]

K. B. Suenson-Taylor for another party interested.

Sir Lionel Heald A.-G. and *Denys Buckley* for the Treasury Solicitor. In *Russian and English Bank and Florance Montefiore Guedalla v. Baring Brothers & Co.*³ Lord Macmillan indicated in his speech that the Attorney-General, on behalf of the Crown, was present when the winding-up order was pronounced and, in acquiescing, must be taken to have had in view all its consequences.

This order was made to protect the interest of the Crown in respect of its right to bona vacantia, and that right, in principle, has not been taken away. When the winding up is completed, if there are any assets remaining, the right of the Crown to bona vacantia is to be revived.

The only question before the court is how far the order goes, and, in order to find that out, it is necessary to look at the precise language of the proviso. This is the first occasion on which the Crown has thought fit to assert its claim against the liquidator.

Russell Q.C. in reply.

WYNN-PARRY J. This is a summons by the liquidator in the liquidation of the company raising a short point of construction of the order by which this company was ordered to be wound up.

[After stating the facts his Lordship continued:] It is

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¹ [1936] A.C. 405, 410, 417, 423,

425, 433.

² [1944] Ch. 404.

³ [1936] A.C. 405, 439.

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admitted on behalf of the liquidator that, at the date of the liquidation, the Crown had a claim against all the assets within the jurisdiction as bona vacantia. It is, on the other hand, admitted by the Crown that that claim was one which was defeasible; indeed, no other position could have been taken up as regard this point on behalf of the Crown, having regard to the observations of Lord Atkin in the course of his opinion in *Russian and English Bank and Florance Montefiore Guedalla v. Baring Brothers & Co. Ltd.*⁴ Lord Atkin is reported as saying,⁵ after considering an argument which had been addressed to the House under section 190 of the Companies Act, 1929: "The initial futility remains. 1. There is no property belonging to the company. 2. What has been the property of the company now belongs to a third person, the Crown, and there is no power to vest the property of a third person in the liquidator. The result is that if the company for the purposes of winding up is to be treated as dissolved there never can be any assets over which the liquidator can exercise any powers of any kind. On the assumption I prefer to adopt the Crown acquires a defeasible title defeated upon the making of a winding-up order."

It is, I think, clear that, but for the inclusion of the last paragraph in this order, this case would be unarguable on behalf of the Crown. If the Crown's contention is right, then it appears to me that there is great force in the submission made by Mr. Russell, on behalf of the liquidator, that the order is a nullity, or, if that be thought too strong, is at any rate nothing more than a solemn farce. I pressed the Attorney-General on this aspect of the matter, and his answer was, in part at any rate, that it did not necessarily follow that because the last paragraph, according to his submission, was completely unqualified, nothing could result from the making of the order and the setting in motion of the winding-up administration, because, as regards his dealing with any particular asset or assets, it would have been open to the liquidator to proceed, as he would have proceeded but for the inclusion of that paragraph, unless and until stopped by the Crown. With all respect to that suggestion, it appears to me merely to underline the artificial position which would result if I acceded to the Crown's argument. A more hopelessly inconvenient position could hardly be imagined, and I repeat what I suggested in argument, that on that basis it is

⁴ [1936] A.C. 405.

⁵ Ibid. 426.

difficult to believe that any responsible professional man would be found in the City of London to undertake a liquidation under such circumstances. It is perfectly true that the last paragraph, if taken by itself and construed literally, can be said to be in very wide terms and to present difficulty in putting on it any qualification, because, as the Attorney-General very rightly emphasized, the provision relates to any of the assets which may have become bona vacantia. Although that paragraph, taken by itself, may be capable of producing what to my mind would be a most unfortunate result, it is to be remembered that a cardinal canon of construction requires that that paragraph should be construed on a consideration not only of the whole of the order but against the background properly to be taken into consideration, which must include the whole of the legislation pursuant to which the order was made—that is, the Companies Act, 1948.

The object of the legislation, as is made clear, both on the face of the statute and in numerous decided cases—I need only refer in passing to the opinions of the majority of their Lordships in *Russian and English Bank and Florance Montefiore Guedalla v. Baring Brothers & Co.*⁶—so far as the winding up of companies, including such a company as this, is concerned, is to ensure administration, the collection and getting in of the assets which are within the reach of the liquidator, and the distribution thereof or such part thereof as may be necessary, among those who are properly entitled to participate in such distribution as creditors. In the case of an ordinary company registered in this country the rights of contributories have also to be considered, but in a case such as this where the company has been dissolved, and dissolved so long ago under the laws of the country of its incorporation, there can, of course, be no question of the rights of contributories.

It appears to me that it is most important to bear in mind the object of the statute, and the object of the order in bringing into operation the provisions of the statute; that is plainly intended to be done by every word that is used in this order until one comes to the last paragraph. If the matter stood there, I should be prepared either to construe that paragraph as having necessarily a more limited meaning than its prima facie wide literal meaning, or else as being repugnant to the rest of the order. For myself, I think it can be construed so as to be consistent with the rest of the order, and I think the key to it is to be found in the preceding paragraph, under which it was ordered that the

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costs, not only of the petitioner but of the solicitor for the affairs of His Majesty's Treasury, be taxed and paid out of the assets of the company.

To what a solemn farce the court must have lent itself if the contention of the Crown is correct. What need was there for taxing the costs of the solicitor for the affairs of His Majesty's Treasury, and what need to provide that those costs, when taxed, should be paid out of the assets of the company which, on the hypothesis on which I am proceeding, were all the time the property of the Crown? Effect must be given to that paragraph, and that paragraph clearly proceeds on the basis that the control over the assets is vested in the liquidator, and therefore the last paragraph must be read with some qualification imposed on it. What is the extent of that qualification to be? In my view, the qualification suggested by Mr. Russell in his argument is the proper one, and it is the common-sense one. It is the one which presents itself to one's mind when endeavouring to give effect to the object of the legislation and the object of the order, and that is that the right of the Crown which, though defeasible, existed before the winding-up order, is only to be temporarily defeated, and defeated only to the extent necessary to give effect to the order and the administration which will follow consequent on the order.

If at the end of that proper administration there should be found to be a surplus, then it is that surplus, and to my mind no more than that surplus, which is saved to the Crown by this concluding paragraph. For myself, I should hesitate long before bringing myself to be a party to producing such a futility as would necessarily have been produced, if I had felt compelled to accede to the Crown's argument, but I feel that, for the reasons which I have endeavoured to give, that futility can properly be avoided, and therefore, in answer to the summons in this matter, I propose to answer the question in the negative.

There is one thing which I desire to add, namely, that in my view the form of this last paragraph of the order ought to be the subject of very careful consideration for the future. It is clear that it is advisable that a modified form should be produced so as to remove any such doubt as has arisen and has had to be resolved in this summons.

Declaration accordingly.

Solicitors: *Linklaters & Paines; Stephenson, Harwood & Tatham; Treasury Solicitor.*

J. L. D.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1952, will be as follows:—

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9. — Construction—Gift to "relations" after prior life interest—Date of ascertainment of class—Whether joint tenants or tenants in common.

In re GANSLOSER'S WILL TRUSTS. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA v. CHILLINGWORTH - - - C.A. 30

10. — Construction—Gift to son for life and then to his sons "successively according "to seniority in tail male"—Whether gift to son constituted life tenancy or tenancy in tail male—Rule in Shelley's case.

In re WILLIAMS. TUCKER v. WILLIAMS
Roxburgh J. 828

11. — Construction—No named executor—Named beneficiaries—Subject-matter given left blank—Effect.

In re STEVENS, DECD. PATEMAN v. JAMES
Wynn-Parry J. 323

12. — Construction—Payment of outgoings of estate—Equitable rule as to apportionment between capital and income—Direction in will that income from unsold property be applied as if it were "income arising from . . . investments . . . to be made of the proceeds of "sale . . ."—Rule not excluded.

In re ULLSWATER, DECD. BARCLAYS BANK LD. v. LOWTHER - - - Roxburgh J. 105

WILL—continued.

13. — Construction—Printed form—Residuary bequest "equally between St. Peter's "Church, Staines, and Oxford University"—Second devise and bequest of residue "not "hereby otherwise disposed of" to executors "to deal with at their discretion"—No inconsistency—First residuary bequest valid.

In re GARE, DECD. FILMER v. CARTER
Harman J. 80

14. — Death duties—Direction that "all "legacies and bequests . . . and all devises "be enjoyed free of death duties"—Settled devise—Duties payable on death of tenant for life.

In re HOWELL, DECD. DRURY v. FLETCHER
Vaisey J. 264

15. — Declaration that trustees are authorized to determine whether moneys are to be considered as capital or income and to determine all questions of doubt—Declaration that such determination shall be conclusive and binding on beneficiaries—Repugnancy—Jurisdiction of court—Validity of declarations.

In re WYNN, DECD. PUBLIC TRUSTEE v. NEWBOROUGH - - - Danckwerts J. 271

16. — Legitimation. See LEGITIMATION.

17. — Name and arms clause—Validity—Uncertainty—Tenant for life not to "disuse" name or arms.

In re BOUVERIE, DECD. BOUVERIE v. MARSHALL - - - Vaisey J. 400

18. — Statutory power of advancement—Death of testator before January 1, 1926—Execution after that date of instrument by donee of power appointing part of trust fund to her children—Whether "constituted or "created before the commencement of" the Trustee Act, 1925—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 32 (3).

In re BATTY, DECD. PUBLIC TRUSTEE v. BELL - - - Vaisey J. 280

19. — Two wills—Second will not revoking first will—Second will found by court to be intended to be substituted for first will—Legacies in first will neither revoked nor mentioned in second will—Legacies in first will to stand.

In re PLANT, DECD. JOHNSON v. HARDWICKE - - - Roxburgh J. 298

20. — See, ADMINISTRATION; REVENUE; TRUSTS.



